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Supreme Court, U.S.
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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN LAGOS,

Petitioner

vs.

MODESTO CITY SCHOOLS DISTRICT, JEROME KOPP, JOE GREGORI, BOB POKORNY, MICHAEL McKIBBAN, STEVEN GREENBEAUX, RON VERMEULEN, ALAN VINCENT, DAN WOOD,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED:

1. Whether, as a matter of law, California Education code Section 44923 precluded a public high school baseball coach from proving that he had a constitutionally-protected property interest in his continued re-employment of that coaching position.

2. Was Petitioner's slander/libel claim against respondent Jerome Kopp, properly dismissed.

3. Whether Petitioner alleged a sufficient constitutionally-protected liberty interest.

4. Was the Court of Appeals award of attorneys' fees to Appellees proper pursuant to Federal Rule of Appellate Procedure 38 and 28 U.S.C. Section 1927.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, John Lagos, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case on May 31, 1988.

OPINIONS BELOW

The opinions of the United States Court of Appeals, including the original March 28, 1988 opinion of the United States Court of Appeals for the Ninth circuit, the May 31, 1988 amended opinion and its July 14, 1988 Order Allowing Attorney's Fees, and the decision, order and Judgment of Dismissal of the United States District Court for the Eastern District of California, are included in the Appendix as Exhibits, A, B, C, and D respectively.

JURISDICTION

Petitioner brought his action for declaratory and injunctive relief and damages under the provisions of 42 U.S.C. Section 1983, claiming that respondents, acting under color of state law, terminated the petitioner's contract of employment without cause, without notice, without hearing in violation of petitioner's right to due process of law under the Fourteenth Amendment — all admittedly motivated by improper political considerations. It was alleged that the District Court had jurisdiction under the provisions of 28 U.S.C. Section 1343(3). Petitioner's Third Motion to Dismiss pursuant to Federal Rules of Civil Procedure 8(a) and 12(b)(6) was heard and decided in favor of respondents on March 16, 1987 — without leave to amend. The District Court had earlier dismissed petitioner's slander cause of action directed to respondent Jerome Kopp on May 19, 1986.

Timely appeal was perfected to the United States Court of Appeals for the Ninth Circuit by Petitioner. On March 28, 1988, a unanimous panel of the Court of Appeals affirmed the District Court. By order of the panel and pursuant to petitioner's Petition for Rehearing and Suggestion of Rehearing En Banc filed on April 8, 1988, the panel amended its original opinion and filed an Amended opinion dated May 31, 1988. On July 14, 1988, pursuant to Respondents' motion, the panel awarded attorney's fees against Petitioner in the sum of $5,525.00.

Jurisdiction of the United States Supreme Court to review

the decision of the Court of Appeals by petition for Writ of Certiorari is conferred by 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fourteenth Amendment to the Constitution of the United States, 42 U.S.C. Section 1983 and the California Education Code, Section 44923, are set forth in the Appendix as Exhibit E.

STATEMENT OF THE CASE

The petitioner is an individual employed by the Modesto City Schools District as both a high school teacher and baseball coach. Respondents are the Modesto City Schools District and various employees thereof, including a principal, school board members, athletic director, and a teacher. On Fegruary 21, 1986, Petitioner filed his complaint for damages averring a conspiracy to wrongfully deny his constitutional civil rights in terminating him from his baseball coaching position in not renewing the same without notice, an opportunity to defend his position and in such a manner so as to violate his liberty interests. The gravamen of Petitioner's complaint was that he had a property interest in his continued re-employment in the varsity head baseball coaching position at Thomas Downey High School — which was taken away from him without substantive or procedural due process. The complaint further alleged a claim for slander and defamation, alternately by Respondents Jerome Kopp and Ron Vermeulen — the latter claim which was dissmissed as a pendent state claim at the time of the District Court's final dismissal on March 16, 1987. Petitioner was given several opportunities to amend his original complaint.

According to the allegations of the Second Amended Complaint, Petitioner alleged that, prior to September 1, 1974 (the date he was hired by Respondent Modesto City Schools District) he was an employee of the Marysville School District. He allege that he left the Marysville School District employ-

ment to become employed by the Modesto City Schools District as a math/wrestling coach/physical education teacher at Thomas Downey High School following a discussion between the then-Thomas Downey High School principal and Petitioner in which Petitioner was verbally assured by the principal that he would ultimately placed in his "strength" position which both parties, at that time, knew and understood was coaching baseball. Petitioner further alleged that it was the intention of both parties, including the Modesto City Schools District, to permit Petitioner to remain in his coaching positions until such time as Respondent Modesto City Schools District had good cause to remove Petitioner. Petitioner further alleged that the parties agreed, in writing, to employ Petitioner as a math and physical education teacher and head wrestling coach at Thomas Downey High School for the 1974-75 school year and that, in reliance upon all of the foregoing, Petitioner arranged for his termination of his Marysville School District employment and moved to and became a resident of the City of Modesto and an employee of the Modesto City Schools District.

Petitioner further alleged that no one informed him, prior to his acceptance of the foregoing employment by Respondent Modesto City Schools District that his coaching responsibilities were "one-year positions" terminable by Modest City Schools District without a showing of good cause and/or without procedural or substantive due process. he further alleges that, consistent with the alleged verbal assurance to place petitioner in his "strength" position of coaching baseball, Petitioner became the assistant freshman baseball coach for the school year 1974-75 which further becoming the assistant varsity baseball coach for the school years 1975-77. He further alleged that for the school years 1974-77, in addition to his baseball coaching responsibilities, he retained all of his employment duties as the head wrestling coach.

Petitioner further alleged that, after a personal leave of absence for the school year 1977-78 to coach intercollegiate baseball, earn his master's degree in physical education and to enhance his value to Respondent Modesto City Schools District as a baseball coach, he returned to his employment

with the Modesto City Schools District and Thomas Downey High School for the 1978-79 school year and was reinstated to all of his pre-existing job responsibilities including teaching math, physical education, head wrestling coach while further becoming, as originally agreed-upon and intended by the parties, the head varsity baseball coach. Petitioner further alleged that he continued with his teaching responsibilities while further retaining his head varsity baseball coaching position for the school years from September 1978 through the school year ending in June 1983.

Petitioner further alleged that another personal leave of absence was taken by him for the school year 1983-84 and that he was, again, reinstated to his teaching responsibilities and the head varsity baseball coaching position upon his return for the 1984-85 school year. It is further alleged that all of the foregoing conduct was consistent with the original verbal assurance made by the then-principal of Thomas Downey High School on behalf of Respondent Modesto City Schools District. Petitioner alleged that he had a de facto continuing right in his coaching employment responsibilities while further alleging that there was no formal tenure policy for Respondents' athletic coaches. In addition, Petitioner alleged that, just prior to his personal leave of absence for the school year 1983-84, Respondent Jerome Kopp, the principal Thomas Downey High School at the time and while acting on behalf of Modesto City Schools District, informed Appellant that he, Jerome Kopp, would "pull for him."

Notwithstanding all of the foregoing, Petitioner alleged that Respondents unsuccessfully and wrongfully attempted to remove him from his head varsity baseball coaching position upon his return for the 1984-85 school year pursuant to improper motivations. Following the unsuccessful attempt to remove Petitioner for the '84-85 school year, he further alleges that Respondents successfully conspired to wrongfully deprive him of his reasonable expectation of continued re-employment in his coaching position in the manner already described. Petitioner alleged that Respondents, in advance to his formal notification of not being rehired, agreed to do so based on misrepresentation of facts concerning Petitioner's qualifications and abilities as the head varsity baseball coach. Petitioner

further alleged that the only reasons given for his non-renewed contract was that the decision had become a political one.

Petitioner alleged that it was the custom, practice and procedure of Respondent Modesto City Schools District up to and including June 17, 1985 (the date of his formal notification of not being rehired in his coaching position) and continuing to the present, that so long as its coaches performed their tasks satisfactorily, they would continue in that employment!

The denial of equal protection of the law by Respondent is couched in terms of not following its own custom and practice with respect to Petitioner while treating other similarly-situated coaches differently.

Petitioner further alleged that Respondent Jerome Kopp, published statements in the newspaper of general circulation within the City of Modesto that Petitioner "cannot be effective at Downey High School" and that he, Mr. Kopp had "to determine who was the best for the total program at Downey High School." Petitioner further alleged that Respondent Vermeulen published, to third parites, the fact that Petitioner had caused a shortage in the income accounts of the Thomas Downey High School varsity baseball program and that he had further neglected the maintenance of the baseball field.

The District Court, pursuant to the Third Motion to Dismiss filed by Respondents, entered judgment for Respondents on the grounds that Petitioner failed to state a claim.

REASONS FOR GRANTING THE WRIT

I. The Decision Of The Court Of Appeals For The Ninth Circuit Is Inconsistent With Prior Supreme Court Decisions And Non-Ninth Circuit Authorities

In 1972 this Court decided the companion cases of Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) and Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972). Since those decisions, and even though all subsequent circuit decisions are in Petitioner's favor, the Court has considered other "property interest" questions but has not decided any case, with binding precendent,

specifically involving a public school teacher's claim to Fourteenth Amendment property interest protection within the backdrop of a statutory scheme which would appear to invalidate the validity of the contractual basis of the property interest asserted. See Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 l.Ed. 2d 684 (1976); Jago v. Van Curen, 454 U.S. 14, 18-19, 102 S.Ct. 31, 70 L.Ed. 2d 13 (1981) (per curiam); Leis v. Flynt, 439 U.S. 438, 442, 99 S.Ct. 698, 58 L.Ed. 2d 717, rehearing den., 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed. 2d 1060 (1979) (per curiam); see also Guiterez v. City of Chicago (1985) 605 F.Supp. 973, 977; Soni v. Board of Trustees of the University of Tennessee, 513 F. 2d 347 (6th Cir. 1975), cert. denied, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed. 2d 372 (1976); Smith v. Board of Education, 708 F. 2d 258 (7th Cir. 1983). See also Vail v. Board of Education of Paris Union School District No. 95, P.S. (1983) 706 F. 2d 1435. (Aff'd by an equally divided court, 466 U.S. 377 (1984)

The seminal decisions reached by this court in Roth and Sindermann expressly stated that they were not relying upon a legitimate expectation by a discharged public employee premised on a either a formal tenure system or an explicity contractual provision.

The Court of Appeals for the Ninth Circuit misread and chose to ignore this Court's decisions in Roth and Sindermann. As explained therein, Roth held that:

> ...a teacher terminated after one year had no property interest in his continued employment where his unilateral expectations had no basis in statute, contract, or mutually explicit understanding with the university. See Roth, 408 U.S. at 578; see also Vail vs. Board of Education of Paris Union School District No. 95, et al., supra at p. 1437.

Unlike Roth, a property interest was found in Sindermann, which held that a legitimate claim of continued employment:

> ...had been fostered by the rules and the policy of the university, despite the lack of tenure or a contractual provision. See Sindermann, 408 U.S. at 599-601.

In applying the teachings of Roth and Sindermann to the case at bar, the Seventh Circuit in Vail, supra, noted that that case involved a mutually explicit understanding between the public employee school teacher and the public entity school board that Mr. Vail would be employed for the maximum probationary term of two (2) years. Mr. Vail's expectation of continued employment for two (2) years was not merely subjective or unilateral. As in Sindermann, Mr. Vail's and Mr. Lagos' claim of continued employment was fostered by actions of state officials and was reasonably premised.

Underlying the Court of Appeal's decision now the subject of this Petition is the unstated assumption that state law alone determines the legitimacy of claims of entitlement under the Constitution and Civil Rights Act. This assumption raises the issue of whether, on the facts presented, Petitioner had a right - under the Constitution and Civil Rights Act - to rely on the promises of officials of local government. Under these circumstances, we must distinguish between the underlying constitutional right to be free from arbitrary actions by government officials, and the specific "property" right which Petitioner seeks to protect, i.e., a legitimate claim of entitlement to continued re-employment in his coaching position absent a showing of good cause; a claim which was not created by the Constitution, but rather was created by "an independent source such as state law,".

The gist of Respondent's argument before the Court of Appeal and accepted by it is that the existence of a specific state statutory provision providing that the employment position in issue in this case providing that the same could be terminated at any time, as a matter of law, precluded the application of Roth and Sindermann to support and permit the Petitioner to prove his allegations that he had a de-facto tenure right in his postion as an athletic coach on a mutual understanding reasonably fostered by the employer and on facts essentially identical to those found in the Sindermann decision — which facts supported the allegation of an implied contract between the two parties therein.

Respondents' argument is that the Sindermann court relied on the absence of a formal tenure system which permitted proof of an implied contract theory between the employee

and the school district, whereas, in the case at bar, there exists a specific state statutory provision permitting the termination of a public employee by a school district in any assignment beyond his "full-time assignment." Respondents argued and the Court of Appeals accepted the assumption that, as a matter of law, Petitioner was deemed to know this state statutory provision precluding the assertion of de-facto tenure within the school district as enunciated in the Roth and Sindermann decisions. Respondents even go one step further and misstate the effect of this state statutory provision to constitute an established tenure system. They assert this in order to meet and/or distinguish the holdings of Roth and Sindermann that a reasonable expectation of continued employment premised on an implied contract theory can be proven where there is no established tenure system (of which there is none in the case at bar) providing to the contrary. Accordingly, Haimowitz v. University of Nevada (9th Cir. 1978) 579 F. 2d 526 and Davis v. Oregon State University (9th Cir. 1978) 591 F. 2d 493, and relied upon by Respondents, are of no assistance to Respondents' position and to the Panel's decision. So misinterpreting this Court's seminal decisions and others within the Ninth Circuit, Respondents' argument and the Panel's opinion would limit school employees' federal property interests to claims of tenure, thereby excluding any other valid contractual or other rights of school employees from protection by due process. In other words, according to Respondents and the Court of Appeals, such school employees may be deprived of any right but tenure under color of law, no matter its character or value, and have no redress in federal court. As stated by Eschbach, J., concurring in Vail, such an interpretation "not only finds no support in the (Sindermann) opinion, but is plainly inconsistent with it." 706 F. 2d at 1444.

The Sindermann court required legitimate claims to tenure before finding a "property" interest because tenure is what Sindermann claimed he had. As stated by Judge Eschbach:

> "...Sindermann indeed uses the term tenure — it would be awkward to use another word in discussing Sindermann's claim that he had tenure." Id.

The Sindermann court did not state or even imply that, in academic employment, claims of formal tenure are the only interests that could rise to the level of "property" interests under due process. Such a limitation finds no support in logic, or this Court's Language. The Sindermann opinion made clear that such property interests "are not limited by a few rigid, technical forms." 408 U.S. at 601. Sindermann did not even involve a formal statutory tenure scheme. See 408 U.S. at 600-602. (It relied upon an implied contract theory justifying a de-facto tenure claim.) Respondents' argument on this point falls of its own weight. It is, indeed, interesting to note that the Court of Appeal's opinion does not even attempt to distinguish this Court's decision in Sindermann whose facts are identical to the case at bar!

Judge Eschbach, in the Vail decision, reaffirms and is consistent with the holdings of this court that even a probationary employee, who can prove the existence of an implied contract right to continued employment under state law, has satisfied the requirements set forth in Roth to establish a protectible property interest under the Fourteenth Amendment. Likewise, the majority opinion in Vail reasons that once the existence of an implied contract is established by a probationary teacher, a protectible property interest is created in spite of a statutory tenure scheme.

It is Petitioner's position that, under the teachings of Roth and Sindermann, tenure is not the only conceivable protectible interest in academia, and that the legitimacy of claims of entitlement cannot and should not be limited to a few rigid, technical forms, especially where those claims arise out of mutually explicit understandings with governing authorities-acting under color of state law - which to not contradict or infringe on statutory benefit schemes. Roth; Sindermann. Were it otherwise, the arbitrary[1] actions of government officials would be transformed from the gist of a due process claim to a defense of such claim. Neither the Constitution nor the cases dictate such a result.

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1 Arbitrary in the sense that they are unauthorized by state law.

II

THE DECISION OF THE COURT OF APPEALS FOR THE NINTH CIRCUIT IS IN CONFLICT WITH AT LEAST TWO OTHER FEDERAL CIRCUIT COURTS

The Court of Appeal's opinion does not speak to or attempt to distinguish Guiterez v. City of Chicago 605 F. Supp. 973, decided in 1985 by their brethren from the Seventh Circuit or Soni v. Board of Trustees of the University of Tennessee 513 F. 2d 347 decided in 1975 by their brethren from the Sixth Circuit.

In Soni v. Board of Trustees of the University of Tennessee, the Sixth Circuit sustained the plaintiff's allegations of a sufficient constitutionally-protected property interest in his employment based upon his reasonable reliance on assurances and prior conduct by university officials despite state law and university regulations which prohibited an alien from receiving such employment. In accord with the idea that state law prohibiting the conduct giving rise to the contract claim of a public employee does not insulate the public entity from the kind of civil rights due process claim now the subject of this appeal, see Guiterez v. City of Chicago 605 F. Supp. 973 (1985) 7th Cir.) ("If defendant Pounian's memoranda are indeed inconsistent with Rule IX and with state law, they should have to bear the consequences of issuing contradictory edicts, not plaintiffs." Guiterez, at page 977.)

The Court of Appeal, in the case at bar, made no attempt to distinguish the facts of the Vail decision, affirmed by an equally divided court (466 U.S. 377 (1984)). In Vail, the plaintiff, like Petitioner — the high school athletic coach — was a nontenured employee. In Vail there was a statutory tenure system which conferred tenure rights upon such teachers only after a period of probationary employment whereas for Petitioner, as an athletic coach, there was no statutory tenure system. The plaintiff in Vail argued that certain actions by the Board of Education contained a clearly "implied promise" under Roth to be employed, thereby creating a property interest protectible by the Constitution. The basis of the "implied promise" in Vail is the only distinguishing fact from the case at bar; and that distinction is hollow in light of the

fact that both "implied promises" were the creation of the employing boards of education. In other words, the promise to employ Mr. Vail for two years occasioned by a consensus opinion of the Board of Education is no different than the actions of the Respondents in inducing Petitioner to change his employment, not informing him of any conditions upon his employment, promising him to be placed in his position of strength and in renewing and reinstating Petitioner in his athletic coaching positions for 10 years and to continue to do so absent a showing of good cause for his non-renewal. This Court of Appeal made no attempt to explain or distinuish why the Vail decision prevented the panel, in the case at bar, to rely on the argument that state law did not preempt Petitioner's constitutional civil rights claim. The Vail decision's importance to the Petitioner is implicitly admitted where the best that the panel could do was to state: "As the Supreme Court divided evenly, 'no principal' was 'settled' by Vail." (See Petitioner's Appendix at pgs. 6 and 14)

The panel of the Ninth Circuit in the case at bar further did not take into account the inconsistency of its position with yet another 1983 Seventh Circuit decision involving high school athletic coaches. (Smith v. Board of Education) While the plaintiffs in Smith failed to pass muster with their allegation because the complaint did not properly allege facts sufficient to establish their constitutionally-protected property interest and even though the Smith allegations were critically different from Petitioner's, this panel referred to the Smith decision as containing facts "close to those alleged by the plaintiff in this case" while further finding Smith dispositive against Petitioner. In truth, the panel overlooked critically important facts which distinguished Smith from the case at bar.

The plaintiff coaches in Smith limited their claimed property rights in their coaching positions only upon their own misreading of the Illinois school code, their misunderstanding of contract law, and fact that they had been hired in the past.[2]

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2 This important distinguishing aspect of the Smith decision was not overlooked in Gutierez v. City of Chicago,

In Smith, the Court further found it significant that the coaches had not alleged that they had made any sacrifices in addition to their continued employment.[3] As a matter of fact, the Smith decision admitted that Illinois law would enforce an oral promise to employ a person for life only if the employee made, in return, some sacrifice, i.e., relinquishing another job and spending a considerable amount to relocate himself and his family — that he probably would not have made absent a guaranty of continued employment. (See Smith, supra, at page 263.) The Smith court commented, in dicta, that it was insufficient for the plaintiffs to allege (under Illinois law) that, in exchange for the school board's promise to re-employ them every school year (without more), they promised to coach. Furthermore, the Smith decision relied upon the express language of the one-year contracts attached to the Smith plaintiff's complaint which, on their face, referred and expressly provided that the plaintiff was to be employed for 'the fiscal year 1953-54... in accordance with the provisions of the Illinois tenure law, Article 24 of [the] School Code of Illinois.[4]

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supra, — a 1985 decision interpreting the Smith decision. The Gutierez court did not feel constrained by the Smith decision in ruling that two written memoranda by defendants precluded the granting of a motion to dismiss therein notwithstanding the defense argument that state law precluded the contract claims of the Gutierez plaintiffs.

3 California law does not contain the limitations of Illinois law with regard to requiring consideration independent of the services to be performed. Petitioner did allege a change in his employment.

4 This language doomed the Smith plaintiffs' attempt to prove their written contractual tenure rights by their written contracts — which, by their language, precluded such a finding. No such claim is in issue in the case at bar. Petitioner was relying upon an implied contract and/or mutually explicit understanding basis for his civil rights claims.

The Court of Appeal also overlooked the most important distinguishing fact of the Smith decision (also overlooked by the trial court). In Smith, the plaintiffs's amended complaint, failed to suggest the existence of a common law governing the re-employment of athletic coaches. (Smith, supra, at page 265.) The Smith decision concedes the importance of Petitioner's allegations in the case at bar that there existed a de-facto tenure and/or a policy, etc., within the Modesto City Schools District towards it coaches with respect to their continued re-employment in their positions. Accordingly, the Smith opinion was consistent with the requirement set forth by this court in Roth and Sindermann.[5]

In attempting to distinguish the holdings of this court in Roth and Sindermann, the panel, in its original opinion dated March 28, 1988, attempted to distinuish and negate them by asserting that they stood for the proposition that "an informal tenure system" could be created by practice and not necessarily only by expressed contract. The opinion further asserted that: "Sindermann recognized that at a college or university there could be an informal tenure system created not by express contract but by practice. Sindermann at 602. Roth, recognizing the same possibility, declined to find a property interest where a contract with an assistant professor specifically provided the date on which his employment terminated. As both cases dealt with higher education, they need be understood in a context in which the protection of tenure is also a protection of important First Amendment rights relating to freedom of thought, inquiry and expression... but a coach is not dealing with ideas, and the First Amendment concerns moving a court to look for tenure in higher educa-

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5 In Smith, the court there held that the plaintiff coaches had insufficiently pled a basis for their allegation that they had a "reasonable expectation of continued employment" just because they had been rehired in the past. "There is nothing in the amended complaint to suggest the existence in plaintiffs' school district of a common law governing the re-employment of athletic coaches." (Smith, at page 265.) This part of the Smith holding was overlooked by both the trial court and the Ninth Circuit Court of Appeal in its opinion.

tion are not present in athletics." (See Petitioner's Appendix at pgs. 4-5.) (Petitioner seriously challenges the assumption made by the panel that a coach, in the performance of his duties, cannot be dealing with ideas and First Amendment concerns.) The amended opinion dated May 31, 1988, deleted this false premise and false distinction of Roth and Sindermann, leaving no distinction of this Court's holdings in those cases.

The panel's opinion refers to Loehr v. Ventura Community College District, 743 F. 2d 1310 (9th Cir. 1984) in support of its opinion. The court refers to that opinion for the conclusion that California does not recognize a property interest in a community college district superintendent in his job as superintendent while further noting that the provisions of the California Education Code defined and confined the superintendent's rights therein. Unfortunately, the Loehr opinion does not support the panel's opinion. The Loehr opinion noted that the plaintiff's written contract expressly incorporated state law while expressing no opinion as to whether California statutes would permit Loehr to contract for a property interest in continued employment. (Loehr at page 1314.) As a matter of fact, the Loehr opinion stands for the propostion that the Ninth Circuit reaffirmed that the existence of state law did not necessarily preclude reasonable reliance upon representations and promises made by state officials:

> We expressly refrained from deciding whether the applicable statute would have permitted Loehr independently to contract for a constitutionally-protected property interest in his position as superintendent.

See San Bernardino Physician's Services Medical Group, 825 F. 2d 1404 at page 1407 (1987). The San Bernardino decision of the Ninth Circuit confirmed the fundamental principle that 'property interests' protected by the state and federal due process provisons may arise from the terms of a contract or official board policy as well as from the language of the statute. (See San Bernardino at page 1408.)

III.

PETITIONER HAS A LEGITIMATE CLAIM OF ENTITLEMENT UNDER THE CONSTITUION AND CIVIL RIGHTS ACTS EVEN IN THE ABSENCE OF AN ENFORCEABLE CONTRACT RIGHT UNDER STATE LAW

Even assuming arguendo that the Respondents' conduct, as alleged by Petitioner, and contract implied in law was without authority under state law, Petitioner contends that he has establishe a "legitimate claim of entitlement" under the due process clause and Secion 1983.

Important to this court's review is Respondents' assumption and the assumption of the Court of Appeal that state law alone determines the legitimacy of federal constitutional claims. In this case, Respondents promised and agreed to employer Petitioner as an athletic coach and to place him in his strength position, i.e., baseball coaching and to keep him in that position until such time as Respondents had good cause for his removal. They now argue and the Court of Appeal has agreed, that they had no authority under state law to do precisely what they did. They then assume — without argument or explanation and in spite of the mutually explicit understanding of the parties — that because their own action was prohibited by state law, Petitioner has no claim under federal law. The implication that Petitoner's Federal claim is totally dependent upon provision of state law disregards this Court's admonition that:

> Although the underlying substantive interest is created by 'an independent source such as state law,' federal constitutional law determines whether that interest rises to the level of a 'legitimate claim of entitlement' proctected by the due process clause.

Memphis Light, Gas & Water Division vs. Kraft, 436 U.S. 1, 9, 98 S.Ct. 1554, 1560 (1978) (citations to Roth Omitted). See, generally, Monaghan, of "Liberty," and "Property," 62 Cornell Law Review 405, 434-44 (1977).

In effect, Respondents are attempting to use their own

violation of state law as a defense to Petitioner's federal civil rights claim. If their argument were to become law, then the arbitrary actions of the highest governing officials, though taken under color of law, would be insulated from constitutional scrutiny by the very fact that such actions were unauthorized by state law.

1. A MUTUALLY EXPLICIT UNDERSTANDING WITH GOVERNING AUTHORITIES CAN CREATE A LEGITIMATE CLAIM OF ENTITLEMENT UNDER THE DUE PROCESS CLAUSE

The procedural safeguards of due process "have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary government action." L. Tribe, American Constitutional Law, Section 10-7 through 10-9 (1978) (emphasis supplied). See, e.g., Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729, 736 (1978). Arbitrary government action can take many forms. Though it might typically occur in the deprivation of some recognized benefit, the case at bar evidences another type of arbitrary action, to wit: creation of a legitimate expectation through a mutually explicit understanding and/or implied contract, followed by its deprivation in violation of such explicit understanding. Because arbitrary government action can create as well as deprive on of expectations of entitlement, the due process clause must reach deprivation of such arbitrarily created expectations if they amount to "legitimate claims of entitlement." The due process clause should not condone arbitrary action in creation of a legitimate expectation while prohibiting such action in its deprivation. To assure that the due process clause will be an effective check on arbitrary government action, this court should reaffirm the admonition in the Memphis Light case that the legitimacy of a claim of entitlement under the due process will be determined by federal constitutional law, no state law. Id., at 9, 98 S.Ct. at 1560. Cf. Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S.Ct. 1148 (1982) (state statutory procedures which deprive one

of a state-created entitlement must be analyzed in constitutional terms).

This does not indicate or imply that such claims of entitlement can be created by the constitution or federal law. It is well-established that such claims must be created "by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and support claims of entitlement to those benefits." Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972). Further, in order to support a claim of entitlement based on an understanding, such understanding must be "mutually explicit." Perry vs. Sindermann, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972).

Following Roth and Sindermann, this court has indicated that a mutually explicit understanding can be a source of a legitimate claim of entitlement. In Leis v. Flynt, 439 U.S. 438, 442, 99 S.Ct. 698, 701 (1979), the court cited Sindermann in reiterating that a claim of entitlement may be "derived from statute or legal rule or through mutually explicit understandings. (Emphasis supplied.) Flynt rejected a contention that Respondents were entitled to appear pro hac vice before an Ohio trial court, because they had not shown the "requisite mutual understanding." (Flynt, 439 U.S. at 443, 99 St.Ct. at 701.) The Court's opinion indicated that Respondents would have prevailed, despite express provisions of the state law vesting the trial court with discretion in approving such appearances, if Respondents had been able to show such a mutual understanding.

"The interpretation and application of the due process clause are intensely practical matters... 'the very nature of due process negates any concept of inflexible procedures universally applied to every imaginable situation'. Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748 (1961)." Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729, 736 (1975). To hold that mutually explicit understandings need not be authorized by state law in order to create legitimate claims of entitlement under federal law will confirm the supremacy of federal over state law, preclude reliance on arbitrary government action as a defense to a due process claim, and assure the effectiveness of the due process clause in reaching all types

of arbitrary government actions.

In this case, the source of Petitioner's claim of entitlement was the admitted agreement of the parties not to remove Petitioner from his athletic coaching position absent good cause; the promise to place Petitioner in his strength position, i.e., coaching baseball, the actions of the school board in renewing his coaching responsibilities and/or in reinstating Petitioner in that position over the course of 10 years (identical facts as in the Sindermann case) in the context of an admitted local de-facto common law practice of the school board in its treatment of its athletic coaches — consistent with Petitioner's allegations. That conduct, whether or not authorized by state law, generated the requisite mutually explicit understanding relied on by Petitioner. The question remains as to whether the mutually explicit understanding is sufficient, under the circumstances of this case, to constitute a "legitimate claim of entitlement." See Sindermann, 408 U.S. at 602-3, 92 S.Ct. 2700. The question of whether the understanding was authorized by state law is "but one factor" to be considered in determining the legitimacy of Petitioner's claim. Soni v. Board of Trustees of University of Tennessee, 513 F. 2d 347, 351 (6th Cir. 1975).

2. DETERMINING LEGITIMACY OF CLAIMS OF ENTITLEMENT

The starting point for an analysis of the issue of legitimacy of claims of entitlement starts with the following language in Roth. (408) U.S. at 577, 92 S.Ct. at 2709):

> To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. he must, instead, have a legitimate claim of entitlement to it.

Most significant to the case at bar, Justice Stewart identified the "purpose of the ancient institution of property":

> ... to protect those claims upon which people rely on their daily lives, reliance that must not be arbitrarily undermined. (Id.) (emphasis supplied)

As further explained, a claim of entitlement must:

> stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. (Id.) (emphasis supplied)

In Sindermann, it was explained that such understandings must be "mutually explicit" in order to create a legitimate claim of entitlement. 408 U.S. at 601, 92 S.Ct. at 2699.

Since this Court's opinion in Roth and Sindermann, a great number of cases have discussed the legitimacy of claims of entitlement in Section 1983 actions. Where the basis or source of a claim of entitlement is in state statute or legal rule, the court's consideration of legitimacy has been so limited. See e.g., Bishop v. Wood, 426 U.S. 341, 96 S.Ct. 2074 (1976) and Leis v. Flynt, 439 U.S. 438, 99 S.Ct. 698 (1979) (per curiam). Where, however, the claimant relies on a mutually explicit understanding with government officials acting under color of law, the analysis of the issue is and should not be so limited. As has been said under similar circumstances, the "inquiry should be broad gauged. Reason and shared expectations should be consulted to define the scope of the claimant's 'justifiable' expectations." O'Bannon v. Towne Court Nursing Center, 447 U.S. 773, 797 (1979) (Blackmun, J., concurring) (emphasis supplied). See also Soni v. Board of Trustees of University of Tennessee, 513 F. 2d 347 (6th Cir. 1975); Thomas v. Ward, 529 F. 2d 916 (4th cir. 1975). A review of lower court opinions discloses certain factors which are useful in evaluating the legitimacy of claims of entitlement founded on mutually explicit understandings with government officials acting under color of law.

First and foremost, as stated in Flynt, Roth and Sindermann, there must be a "mutually explicit understanding."

mere informal assurances will not suffice.6 Further, that understanding must create an existing status, not promise some future status.7 Additionally, to be legitimate, the understanding relied on by the claimant must be fostered by governing authorities.8 A claimant could not legitimately rely on assurances from a government official who, under the circumstances, is not clearly not authorized to extend such assurances, whether by his own level of authority, or by other indications of lack of authority.9 In the case at bar, there is no question that we do not have assurances and/or conduct from a government official who, in the instant case, includes

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6 See, e.g., McElearney v. University of Illinois, 612 F. 2d 285 (7th cir. 1979); Stebbins v. Weaver, 537 F. 2d 939 (7th cir. 1976), cert. denied, 429 U.S. 1041 (1977); Haimowitz v. University of Nevada, 579 F. 2d 526 (9th Cir. 1978); Bertot v. School District No. 1, Albany County, Wyoming, 522 F. 2d 1171 (10th Cir. 1975); Cusumano vs. Ratchford, 507 F. 2d 980 (8th Cir. 1974).

7 McElearney; Haimowitz; Ryan v. Aurora Board of Education, 540 F. 2d 222 (6th Cir. 1976); Plummer v. Board of Regents, 552 F. 2d 716 (6th Cir. 1977); Bertot; Cusumano.

8 The requirement that the understanding be reached with governing authorities satisfies another requirement of a civil rights action in those claims asserted against the government entity itself. If the understanding is reached by officials whose actions 'may fairly be said to constitute official policy,' it fulfills the requirement that the state be directly implicated in the wrongful or arbitrary conduct. See Monnell v. Dept. of Social Services, 436 U.S. 658, 692, 98 S.Ct. 2018, 2035-36 (1978). See also, Quinn v. Syracuse Model Neighborhood Corp., 613 F. 2d 438, 448, (2nd Cir. 1980).

9 See Bollow v. Federal Reserve Bank of San Francisco, 650 F. 2d 1093 (9th Cir. 1981); Ventetuolo v. Burke, 470 F. Supp. 887 D.R.I., 1978, affirmed 596 F. 2d 476 (1st Cir. 1979); Mack v. Cape Elizabeth School Board, 553 F. 2d 720 (1st Cir. 1977).

the governing school board, principal and individual board members that work for the school district.

3. ANALYSIS OF THE CASE AT BAR

All of the concepts discussed in the above analysis reside in the profound words of Justice Stewart originally quoted above from Roth:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. he must have more than a unilateral expectation of it. he must, instead, have a legitimate claim of entitlement to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermine. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.

408 U.S. at 577, 92 S.Ct. at 2709 (emphasis supplied.)

In the case at bar, the Petitioner relies on a mutually explicit understanding creating an existing status and an implied contract arising out of all of the conduct including the renewal/reinstatement issues discussed. Because the understanding was fostered by the highest governing authorities, and did not clearly contradict or infringe on existing statutory benefit scheme, the legitimacy of Petitioner's claim of entitlement is established. The Court of Appeal's unstated assumption that state law alone will determine whether Petitioner has a legitimate claim of entitlement under federal law must be rejected.

IV.

THE AWARD OF ATTORNEY'S FEES TO RESPONDENTS IS UNWARRANTED, UNJUST AND ARBITRARY

The panel below, pursuant to Respondents' motion for

attorney's fees pursuant to Federal Rule of Appellate Procedure 38 and 28 U.S.C. Section 1927 filed on or about June 21, 1988, ordered the payment of Respondents' attorney's fees in excess of $5,000 in a July 14, 1988 order. (See Petitioner's Appendix at page 17.)

Giving the benefit of the doubt to Respondent, it cannot be said that the authorities relied upon by Petitioner for the filing of his lawsuit and his subsequent appeal was so lacking in legal authority that it should be considered frivolous or vexatious.[10] It appears that the order allowing attorney's fees is based on Rule 38 since it is directed only against the plaintiff and not against his counsel.

In opposing the motion, Petitioner unsuccessfully persuaded the court of the basis for liability as well as for the prayer for damages verified by his counsel. he attached copies of other cases similarly predicated on Section 1983 while further citing the authorities set forth in Smith, Vail, Roth, and Sindermann. It is even more disturbing to the Petitioner that attorney's fees were assessed on the grounds of frivolity, vexatiousness or unreasonableness when the panel chose to publish its decision presumably indicating either the lack of precedent in the Ninth Circuit on the issues decided and/or points raised or the need to settle an uncertainty in the law. The decision to publish and the panel's order allowing attorney's fees are not logically consistent. To the Petitioner, the actions of the panel in assessing attorney's fees, while taking into account its originally-proferred reasons for its denial of Petitioner's appeal are consistent with a desire to reach a result not necessarily authorized by the facts or the law and/or to abuse its power and authority. The disturbing import of such an order is to chill citizen's rights of advocacy through their chosen counsel.

It is still the view of Petitioner that his civil rights claim

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[10] 28 U.S.C. Section 1927 simply provides for the payment of costs against one who so multiples the proceedings in any case unreasonably and vexatiously. It provides for the payment of such costs directly against the attorney. The award for attorney's fees in the instant case is as to the Petitioner only.

should never have been dismissed and that he should have been afforded an opportunity to prove his allegations.

V.

CONCLUSION

The Court of Appeal decision appealed from in this proceeding is totally inconsistent with modern jurisprudence which has, not only in California, but in virtually all jurisdictions of the United States, sustained the rights of all public employees to be entitled to the constitutional notion of due process — both procedural and substantive.

Petitioner clearly alleged the existence of an implied contract, authorized by Sindermann and Roth and clearly providing him with a "legitimate claim of entitlement" to continued re-employment subject to a showing of good cause.

In Roth, this Court explained, at some length, the nature of the "property interest" to which the due process clause applies:

> The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interest that a person has already acquired in specific benefits. These interests — property interests — may take many forms... in the area of public employment, the court has held that a public college professor dismissed from an office held under tenure provisions [citation] and college professor and staff members dismissed during the terms of their contracts [citation] have interests in continued employment that are safeguarded by due process. Only last year, the court held that this principle 'proscribing summary dismissal from public employment without a hearing or inquiry required by due process' also applied to a 'teacher recently hired without tenure or a formal contract, but nonetheless with a clearly implied promise of continued employment. [citation]'."

(408) U.S. at page 576-577 [383 L.Ed. 2nd pages 560-561].)

As the afore-quoted passage clearly demonstrates, the

existence of a contract providing for an individual's employment for a term of years itself gives rise to a "property interest" protected by the due process clause, without regard to the presence or absence of any complementary statutory tenure provisions and, as subsequent cases have established, without regard to prohibitive statutory state or local provisions. Indeed, in Roth all of the justices agreed that a governmental entity's dismissal of an employee in the middle of an employment contract must be accompanied by notice and some kind of hearing. The controversy that divided the court in Roth, and in the companion case of Sindermann, was simply whether, in the absence of an explicit employment contract for a term of years, an employee had a right to notice and hearing when the employer refused to re-employ that individual. inasmuch as Sindermann holds that, even in absence of such an express contract, the due process to notice and hearing may attach if the employer's conduct gives rises to an "implied contract" for continued employment, appellant's constitutional right to notice and some kind of hearing is unquestionable.

The failure of the Court of Appeal to give effect to the clear mandate of the Roth and Sindermann decisions and its progeny — all in point — is simply inexplicable.

The many specific factual allegations regarding promises, agreements and conduct by Respondents to Petitioner are dismissed by the Circuit Court's opinion in one sentence; "He alleges nothing from which it could be inferred that he was promised the head coaching position for life." (See Petitioner's Appendix at pgs. 6 and 14.)

The California Court of Appeal's decision in Healdsburg Police Officer's Association vs. City of Healdsburg, 57 Cal.App.3d 444 (1976) found that, notwithstanding the existence of California Government Code Section 36506, which expressly provides that peace officers serve at the pleasure of the city council, pre-disciplinary procedural protections set forth in the Healdsburg Police Department Manual are enforceable, and compliance with the manual is required. (Healdsburg Police Officer's Assoc. v. City of Healdsburg, supra, at page 449.) Thus, the court found that, despite the at-pleasure-statute in the government code, the right to

a pre-termination hearing was founded on "the existence of rules, regulations, understandings or practices, promulgated, fostered and carried out by officials. [citations]." (Healdsburg Police Officer's Assoc. v. City of Healdsburg, supra, at page 4450).

In Healdsburg, the court specifically rejected the city's argument that the protections afforded by the manual were ultra vires and void invoking the theory of equitable estoppel against the city.

> It is black-letter law that where justice requires it, the doctrine of equitable estoppel may be invoked against a... governmental agency [citation]. This doctrine, of course, precluded the consenting or acquiescing party from disputing the validity of acts which were beyond the legitimate powers of the parties when done pursuant to, or in reliance upon, such consent or acquiescence. [citations] Therefore, appellants' claim that enactment of the manual constituted an ultra vires act automatically failed. We are likewise at a loss to discern any substance to appellants' contention that the theory of equitable estoppel may not be relied upon by Respondents because it was not raised in the proceedings below. It is axiomatic that although estoppel is generally a question of fact where, as here the evidence is not in conflict and is susceptible of only one reasonable inference, the existence of estoppel becomes a question of law. [citations]. (Healdsburg Police Officer's Assoc. v. City of Healdsburg, supra, at page 454.)

Petitioner's reliance upon the promises made to him are obvious. It is alleged that he moved to a new town and gave up existing employment in reliance upon Respondents' conduct.

This panel, in its published opinion, made erroneous assumptions concerning the nature of the Petitioner's contract claim (i.e., 1-year contract) while further implicitly embracing a strong dissent by Judge Posner, in the Vail decision, who asserted the "trivialization of the constitution" as a basis

for the denial of constitutional rights to a portion of our citizens. (See Petitioner's Appendix at pgs. 6 and 14.)

The opinion of the Circuit court, in the case at bar, does involve a question of exceptional importance since it questions the continued viability and mandate of this court since the Roth and Sindermann decisions and since it draws unauthorized and unscholarly limitations to that mandate impacting on a substantial class of public employees. Essentially, the opinion, as published, excises not only all athletic coaches at the secondary educational level from the protections of the constitution, but, just as telling, has excised all secondary level employees as well. In doing so, the published opinion directly conflicts with all of the foregoing authority in a rather disturbing manner; a manner which, figuratively, tramples on Petitioner's civil rights and which indicates a need for this court to review and reverse the opinion.

In accordance with the broad public policy purposes of 42 U.S.C. Section 1983, this court broadly described the purposes of Section 1983 in the following terms:

> As a result of the new structure of law that emerged in the post-civil war era — and expecially of the Fourteenth Amendment, which was its centerpiece — the role of the federal government as guarantor of basic federal rights against state power was clearly established. Section 1983 opened the federal courts to private citizens, offering a uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the constitution and laws of the nation...

the very purpose of Section 1983 was to interpose the federal courts between the states and the people, as guardians of the people's federal rights — to protect the people from unconstitutional action under color of state — "whether that action be executive, legislative, or judicial." See Lynch v. Household Finance Corporation, 405 U.S. 538, 543, note 7 (1972). Section 1983 is directed not only at unconstitutional laws but at affording protection of "a federal right in federal courts because, by reason of prejudice, passion, neglect,

intolerance or otherwise, states laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges and immunities granted by the Fourteenth Amendment might be denied by the state agencies." See Monroe v. Pape, 365 U.S. 167, 180 (1961). The Circuit Court did not even address itself to the non-statutory basis for a property interest (contract and local district policy) nor did it provide any explanation for its brief conclusory statements that Petitioner was not stigmatized nor unable to be re-employed. In this action, both the trial court and the Circuit Court, have not acted as the guardian of Petitioner's federal rights. For whatever reason, the federal system, so far, has bent over backwards to create justifications for a result it sought — all in violation of clearly established law. Some of the distinctions and premises made by the Circuit Court panel and the trial court were not even set forth or argued by either the trial court or appellees.

To assess attorney's fees against Petitioner on the grounds suggested by Respondents, in view of the panel's decision to publish its decision and in view of all of the foregoing, is unjust and arbitrary and cries for review by this Court. In Petitioner's opinion, it is some evidence of the need for the Court to clarify and settle the law in this area where, in reasonable and good faith reliance upon the authorities already noted, Petitioner has been found to have acted frivolously.

For all of the above and foregoing reasons, the judgment of the Court of Appeals for the Ninth Circuit should be reviewed.

DATED: August 31, 1988.

Respectfully submitted,

LAW OFFICES OF PANOS LAGOS

By _____
PANOS LAGOS

APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN LAGOS,

Plaintiff-Appellant,

v.

MODESTO CITY SCHOOLS DISTRICT; JEROME KOPP; JOE GREGORI; BOB POKORNY; MICHAEL MCKIBBAN; STEVEN GREENBEAUX; RON VERMEULEN; ALAN VINCENT; DAN WOOD,

Defendants-Appellees.

No. 87-2114
D.C. No. CV-86-0106-REC
OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
February 11, 1988—San Francisco, California

Filed March 28, 1988

Before: Eugene A. Wright, Herbert Y. C. Choy, and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Public Employees/Constitutional Law

Appeal from dismissal of complaint for failure to state a claim. The court affirmed holding that appellant's termina-

EXHIBIT A

tion at the end of his year-to-year contract violated no protected property or liberty interests.

Appellant Lagos sued under 42 U.S.C. § 1983 asserting that he was injured by appellees conspiring to deny him renewal of his year-to-year position as head baseball coach. He seeks to get around the contract by stating that when he left Marysville he was orally assured that he would be ultimately placed in his strength position coaching baseball; that he was never told that his baseball position would be a one year position; and that it was the custom of the school district that it would keep coaches in their coaching positions as long as they performed their tasks satisfactorily. Lagos' amended complaint was dismissed for failure to state a cause of action.

[1] Lagos argues that he had a constitutionally protected property interest in his coaching job. [2] His contract was good for one year. He alleges nothing from which it could be inferred that he was promised the head coaching position for life. An individual's interest in his employment cannot unilaterally create property. Nor has the state created for him any recognized property right. [3] He also has no constitutionally recognized liberty interest infringed by the appellees. He has not been stigmatized nor so burdened that he cannot take advantage of other employment.

COUNSEL

Panos Lagos, Oakland, California, for the plaintiff-appellant.

Carolee Weber, Bolling, Walter & Gawthrop, Sacramento, California, for defendants-appellees.

OPINION

NOONAN, Circuit Judge:

John Lagos sues under 42 U.S.C. § 1983 asserting that he has have been injured by the defendants conspiring to deny him renewal of his year-to-year position as head baseball coach at Thomas Downey High School, a public school in Modesto, California. Lagos' complaint alleges that he was hired in 1974 by the Modesto City Schools District to teach physical education and mathematics and to be the head wrestling coach at Thomas Downey High School. In 1975 he became assistant varsity baseball coach and from 1978 until June 1985 he was head varsity baseball coach. The defendants, charged with depriving Lagos of his civil rights, are the school district, four named members of the school district board, the principal and the vice principal and the athletic director of the high school, and another teacher at the school who in 1985 was made head varsity baseball coach in Lagos' stead. Lagos alleges that he has been deprived of property and liberty without due process and denied the equal protection of the laws. In the complaint filed on his behalf and verified by his brother, Panos Lagos, he states that he is entitled to damages of not less than $1,500,000, attorneys fees, exemplary damages and punitive damages.

Lagos' employment as baseball coach was by virtue of a contract good for one year that was not renewed in June of 1985. Lagos seeks to get around the contract by stating that when in 1974 he left Marysville he was orally assured by the then principal of Downey High School that he would "be ultimately placed in his 'strength' position" coaching baseball; that he was never told that his baseball position would be a one year position; that in 1983 the present principal told him that he would "pull for him"; that he was replaced because of the defendants' "personal likes and preferences"; and that it was "the custom, practice and procedure" of the school dis-

trict that it would keep coaches in their coaching positions as long as they "performed their tasks satisfactorily."

Lagos' amended complaint was dismissed by the district court for failure to state a cause of action. We review anew. Lagos' efforts to surmount the obvious barrier of the time limitation built into his one-year contract merit no discussion except for his claim that there was a practice which converted the one-year contract into something more. This contention runs squarely into California Education Code Section 44923, which provides:

> In the event a permanent employee of the school district has tenure as a full-time employee of the district, any assignment or employment of such employee in addition to his full-time assignment may be terminated by the governing board of the district at any time.

Lagos was a permanent employee of the school district having tenure as a full-time teacher of mathematics. His assignment as baseball coach falls within the language of the statute. The statute gave notice to Lagos that there was no custom in California of creating tenure for coaches who were already employed as full-time teachers in a school.

In the remote background of Lagos' complaint are *Roth v. Board of Regents*, 408 U.S. 564 (1972) and *Perry v. Sindermann*, 408 U.S. 593 (1972). *Sindermann* recognized that at a college or university there could be an informal tenure system created not by express contract but by practice. *Sindermann* at 602. *Roth*, recognizing the same possibility, declined to find a property interest where a contract with an assistant professor specifically provided the date on which his employment terminated. As both cases dealt with higher education, they need be understood in a context in which the protection of tenure is also a protection of important First Amendment rights relating to freedom of thought, inquiry and expression.

See e.g., Sweeney v. New Hampshire, 354 U.S. 234, 261-262 (concurring opinion).

High school coaches are not second class citizens. To the contrary, they perform important educational work. Their impact on their teams and school may be greater than that of any other teacher. An outstanding coach may have a reputation far beyond his community and may make an impression on boys or girls that is deeper and more lasting than the imprint of any classroom teacher. But a coach is not dealing with ideas, and the First Amendment concerns moving a court to look for tenure in higher education are not present in athletics.

[1] Lagos argues that he had a constitutionally protected property interest in his coaching job. We have held that California does not recognize a property interest in a community college district superintendent in his job as superintendent. *Loehr v. Ventura Community College District,* 743 F.2d 1310 (9th Cir. 1984). We noted that provisions of the California Education Code defined and confined the superintendent's rights.

In San Bernardino Physicians Services Medical Group, 825 F.2d 1404 (9th Cir. 1987), we held that a medical services group's contract with a county did not constitute constitutionally protected property. In broad dictum we suggested that employment contracts were more easily protectible than other contracts and that crucial factors in treating them as property were the security with which they were held under state law and the importance they had to the employee as an individual. *Id.* at 1409. The Supreme Court has affirmed a case holding on its particular facts that a school athletic director and football coach had property in his employment contract. *Vail v. Board of Education,* 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided Court,* 466 U.S. 377 (1984). In *Vail* the athletic director was persuaded to give up the job in Joliet he had held for thirteen years, take a salary cut, and

move to Paris, Illinois to rejuvenate its athletic program, a feat he did not believe could be accomplished in one year. His new contract was formally for one year but the board of education promised him that it would renew him for a second year. The board, instead, terminated him in the first year, invoking Illinois law which required only 60 days' notice to terminate a new teacher. *Id.* at 1436. Upholding the director's section 1983 claim, the district court found that he had in fact a two-year employment contract, which constituted property, arbitrarily and therefore unconstitutionally taken by the board. The court of appeals did not find the district court's finding of fact clearly erroneous. *Id.* at 1438. As a matter of law the court of appeals held that a two-year contract was not unlawful in Illinois, that the board had exercised its legal discretion to give such a contract, and that Vail was not claiming any right of tenure, "which would have been extinguished by the actions of the Board." *Id.* at 1439. Judge Posner dissented on the ground that this "squabble" between a school and its football coach should not have been in the federal courts. He protested that if the majority was right, every breach of a public employment contract by a public body could be turned into a constitutional tort, *id.* at 1450, a result "contrary to every principle of federalism and good sense." *Id.* at 1456.

As the Supreme Court divided evenly, "no principle" was "settled" by *Vail. The Antelope* 23 U.S. (10 Wheat.) 66 at 126 (Marshall, C.J.); *see Neil v. Biggers,* 409 U.S. 188, 191-92 (1972). In *Smith v. Board of Education,* 708 F.2d 258 (7th Cir. 1983) another panel of the Seventh Circuit considered whether a high school head football coach for 26 years had tenure in his coaching job, protectible as property under the Constitution, and held that he did not. The facts alleged in *Smith* are close to those alleged by the plaintiff in this case. In *Smith,* as in this case, they do not state a cause of action.

[2] Lagos' contract was good for one year. He alleges nothing from which it could be inferred that he was promised the head coaching position for life. An individual's interest in his

employment is a reasonable factor to be considered in determining whether he has property in his job, and there is no doubt that Lagos had a high emotional investment in his coaching position. But an individual's interest cannot unilaterally create property. The security with which the job is held is also relevant. *San Bernardino Physicians, supra* at 1409. Lagos had no security. The board hired him from year to year. The allegation of a custom to the contrary is refuted as a matter of law by the California Education Code Section 44973. Lagos continues to enjoy tenure as a mathematics teacher. California expressly does not grant tenure in assignments additional to regular full-time assignments. California created no property for Lagos of which he has been arbitrarily deprived. *Loehr, supra* at 1315; *Barthuli v. Board Trustees,* 19 Cal3d 717, 566 P.2d 261, 139 Cal.Rptr. 627 (1977), *cert. denied* 434 U.S. 1040 (1978).

[3] Lagos also has no constitutionally recognized liberty interest infringed by the defendants. He has not been stigmatized by his non-renewal; he has not been so burdened that he cannot take advantage of other employment opportunities. *Ballow v. Federal Reserve Bank,* 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied,* 455 U.S. 948 (1983). Who is a good coach is apt to be the subject of debate. It is no shame to lose one's job in such an argument. We were assured in oral argument that John Lagos' coaching record was "excellent." We can understand his pain at not being renewed, at not having the continued opportunity to do what he loves to do. But his disappointment is not a loss of that liberty which the Constitution guarantees.

Lagos' equal protection claim has not been pressed on appeal. His pendent state claim for defamation has been rightly dismissed. The district court was correct in granting the defendants' motion to dismiss the entire case.

As a result of his disappointment Lagos has made the school district and the individual defendants defend a federal

law suit both in the district court and on appeal. He has subjected them to the payment of their attorneys fees. He has asked for very large actual damages. When queried in oral argument how he had arrived at these damages, counsel replied that they were based on the loss of Lagos' coaching stipend (not more than $1500 per year) and the fact that "in an Alameda County case" he knew of someone getting a $300,000 verdict in what seemed to him analogous circumstances. It is extraordinarily difficult to see what justification existed for the verified complaint's assertion that Lagos' damages were not less than $1.5 million. We do not sympathize with any effort to make uncomfortable or intimidate the individual defendants or the board by claiming an astronomical amount not based on any identifiable facts.

AFFIRMED.

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN LAGOS,

Plaintiff-Appellant,

v.

MODESTO CITY SCHOOLS DISTRICT; JEROME KOPP; JOE GREGORI; BOB POKORNY; MICHAEL MCKIBBAN; STEVEN GREENBEAUX; RON VERMEULEN; ALAN VINCENT; DAN WOOD,

Defendants-Appellees.

No. 87-2114

D.C. No. CV-86-0106-REC

ORDER AND AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
Robert E. Coyle, District Judge, Presiding

Argued and Submitted
February 11, 1988—San Francisco, California

Filed March 28, 1988
Amended May 31, 1988

Before: Eugene A. Wright, Herbert Y. C. Choy and John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Noonan

SUMMARY

Public Employees/Constitutional Law

Appeal from dismissal of complaint for failure to state a claim. The court affirmed holding that appellant's termina-

tion at the end of his year-to-year contract violated no protected property or liberty interests.

Appellant Lagos sued under 42 U.S.C. § 1983 asserting that he was injured by appellees conspiring to deny him renewal of his year-to-year position as head baseball coach. He seeks to get around the contract by stating that when he left Marysville he was orally assured that he would be ultimately placed in his strength position coaching baseball; that he was never told that his baseball position would be a one year position; and that it was the custom of the school district that it would keep coaches in their coaching positions as long as they performed their tasks satisfactorily. Lagos' amended complaint was dismissed for failure to state a cause of action.

[1] Lagos argues that he had a constitutionally protected property interest in his coaching job. [2] His contract was good for one year. He alleges nothing from which it could be inferred that he was promised the head coaching position for life. An individual's interest in his employment cannot unilaterally create property. Nor has the state created for him any recognized property right. [3] He also has no constitutionally recognized liberty interest infringed by the appellees. He has not been stigmatized nor so burdened that he cannot take advantage of other employment.

COUNSEL

Panos Lagos, Oakland, California, for the plaintiff-appellant.

Carolee Weber, Bolling, Walter & Gawthrop, Sacramento, California, for defendants-appellees.

ORDER

The opinion filed March 28, 1988 is amended as follows:

Slip op. at 6223, first sentence: remove the word "have."

Slip op. at 6223, same paragraph, lines 12 and 13: change "the principal and the vice principal" to "the principal, vice principal."

Slip op. at 6224, second full paragraph: Add after "something more." a cite to *Perry*.

Slip op. at 6225, First full paragraph beginning "In the remote background": delete entire paragraph and the following paragraph which ends, "are not present in athletics."

OPINION

NOONAN, Circuit Judge:

John Lagos sues under 42 U.S.C. § 1983 asserting that he has been injured by the defendants conspiring to deny him renewal of his year-to-year position as head baseball coach at Thomas Downey High School, a public school in Modesto, California. Lagos' complaint alleges that he was hired in 1974 by the Modesto City Schools District to teach physical education and mathematics and to be the head wrestling coach at Thomas Downey High School. In 1975 he became assistant varsity baseball coach and from 1978 until June 1985 he was head varsity baseball coach. The defendants, charged with depriving Lagos of his civil rights, are the school district, four named members of the school district board, the principal, vice principal and the athletic director of the high school, and another teacher at the school who in 1985 was made head varsity baseball coach in Lagos' stead. Lagos alleges that he has been deprived of property and liberty without due process and denied the equal protection of the laws. In the complaint filed on his behalf and verified by his brother, Panos Lagos, he states that he is entitled to damages of not less than

$1,500,000, attorneys fees, exemplary damages and punitive damages.

Lagos' employment as baseball coach was by virtue of a contract good for one year that was not renewed in June of 1985. Lagos seeks to get around the contract by stating that when in 1974 he left Marysville he was orally assured by the then principal of Downey High School that he would "be ultimately placed in his 'strength' position" coaching baseball; that he was never told that his baseball position would be a one year position; that in 1983 the present principal told him that he would "pull for him"; that he was replaced because of the defendants' "personal likes and preferences"; and that it was "the custom, practice and procedure" of the school district that it would keep coaches in their coaching positions as long as they "performed their tasks satisfactorily."

Lagos' amended complaint was dismissed by the district court for failure to state a cause of action. We review anew. Lagos' efforts to surmount the obvious barrier of the time limitation built into his one-year contract merit no discussion except for his claim that there was a practice which converted the one-year contract into something more. *Perry v. Sindermann*, 408 U.S. 593 (1972). This contention runs squarely into California Education Code Section 44923, which provides:

> In the event a permanent employee of the school district has tenure as a full-time employee of the district, any assignment or employment of such employee in addition to his full-time assignment may be terminated by the governing board of the district at any time.

Lagos was a permanent employee of the school district having tenure as a full-time teacher of mathematics. His assignment as baseball coach falls within the language of the statute. The statute gave notice to Lagos that there was no custom in Cali-

fornia of creating tenure for coaches who were already employed as full-time teachers in a school.

[1] Lagos argues that he had a constitutionally protected property interest in his coaching job. We have held that California does not recognize a property interest in a community college district superintendent in his job as superintendent. *Loehr v. Ventura Community College District*, 743 F.2d 1310 (9th Cir. 1984). We noted that provisions of the California Education Code defined and confined the superintendent's rights.

In San Bernardino Physicians Services Medical Group, 825 F.2d 1404 (9th Cir. 1987), we held that a medical services group's contract with a county did not constitute constitutionally protected property. In broad dictum we suggested that employment contracts were more easily protectible than other contracts and that crucial factors in treating them as property were the security with which they were held under state law and the importance they had to the employee as an individual. *Id.* at 1409. The Supreme Court has affirmed a case holding on its particular facts that a school athletic director and football coach had property in his employment contract. *Vail v. Board of Education*, 706 F.2d 1435 (7th Cir. 1983), *aff'd by an equally divided Court*, 466 U.S. 377 (1984). In *Vail* the athletic director was persuaded to give up the job in Joliet he had held for thirteen years, take a salary cut, and move to Paris, Illinois to rejuvenate its athletic program, a feat he did not believe could be accomplished in one year. His new contract was formally for one year but the board of education promised him that it would renew him for a second year. The board, instead, terminated him in the first year, invoking Illinois law which required only 60 days' notice to terminate a new teacher. *Id.* at 1436. Upholding the director's section 1983 claim, the district court found that he had in fact a two-year employment contract, which constituted property, arbitrarily and therefore unconstitutionally taken by the board. The court of appeals did not find the district court's

finding of fact clearly erroneous. *Id.* at 1438. As a matter of law the court of appeals held that a two-year contract was not unlawful in Illinois, that the board had exercised its legal discretion to give such a contract, and that Vail was not claiming any right of tenure, "which would have been extinguished by the actions of the Board." *Id.* at 1439. Judge Posner dissented on the ground that this "squabble" between a school and its football coach should not have been in the federal courts. He protested that if the majority was right, every breach of a public employment contract by a public body could be turned into a constitutional tort, *id.* at 1450, a result "contrary to every principle of federalism and good sense." *Id.* at 1456.

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[2] Lagos' contract was good for one year. He alleges nothing from which it could be inferred that he was promised the head coaching position for life. An individual's interest in his employment is a reasonable factor to be considered in determining whether he has property in his job, and there is no doubt that Lagos had a high emotional investment in his coaching position. But an individual's interest cannot unilaterally create property. The security with which the job is held is also relevant. *San Bernardino Physicians, supra* at 1409. Lagos had no security. The board hired him from year to year. The allegation of a custom to the contrary is refuted as a matter of law by the California Education Code Section 44973. Lagos continues to enjoy tenure as a mathematics teacher. California expressly does not grant tenure in assignment

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[3] Lagos also has no constitutionally recognized liberty interest infringed by the defendants. He has not been stigmatized by his non-renewal; he has not been so burdened that he cannot take advantage of other employment opportunities. *Ballow v. Federal Reserve Bank*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied*, 455 U.S. 948 (1983). Who is a good coach is apt to be the subject of debate. It is no shame to lose one's job in such an argument. We were assured in oral argument that John Lagos' coaching record was "excellent." We can understand his pain at not being renewed, at not having the continued opportunity to do what he loves to do. But his disappointment is not a loss of that liberty which the Constitution guarantees.

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ages were not less than $1.5 million. We do not sympathize with any effort to make uncomfortable or intimidate the individual defendants or the board by claiming an astronomical amount not based on any identifiable facts.

AFFIRMED.

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LAGOS, Plaintiff-Appellant, vs. MODESTO CITY SCHOOLS DISTRICT; JEROME KOPP; JOE GREGORI; BOB POKORNY; MICHAEL MCKIBBAN, STEVEN GREENBEAUX; RON VERMEULEN, ALAN VINCENT; DAN WOOD, Defendants-Appellees.	)	No. 87-2114 DC# CV-86-0106-REC ORDER ALLOWING ATTORNEYS' FEES

Before: WRIGHT, CHOY, and NOONAN, Circuit Judges:

The court has considered the motion for fees filed by counsel for the appellees, the supporting affidavit and the points and authorities submitted in opposition.

A fee award is justified and the appellees are awarded attorneys' fees against the plaintiff in the amount of $5,525.00.

EXHIBIT C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN LAGOS, Plaintiff, vs. MODESTO CITY SCHOOLS DISTRICT; et al., Defendants.	)	No. CV-F-86-106 REC DECISION AND ORDER RE MOTION TO DISMISS SECOND AMENDED COMPLAINT

On March 16, 1987 the court heard defendants' Motion to Dismiss Plaintiff's [Second Amended] Complaint Pursuant to FRCP 8(a) and 12(b)(6). Upon due consideration of the written and oral arguments of the parties and the record herein, the court grants defendants' motion without leave to amend for the reasons set forth herein.

Defendants move to dismiss the Second Amended Complaint for Wrongful Termination of Employment, and Violation of Constitutional Civil Rights and Related Claims on the ground that plaintiff has

EXHIBIT D

failed to state a claim upon which relief can be granted. Essentially, defendants argue that plaintiff has not pleaded sufficient facts establishing that plaintiff had a constitutionally protected property interest or liberty interest in his position as the head varsity baseball coach at Thomas Downey High School such that he could not be terminated from that position without due process of law. Defendants also argue that plaintiff has alleged no facts in support of his claim of denial of equal protection. All of these arguments relate to the First Cause of Action, the Second Cause of Action alleging a pendent claim for slander against defendant Ron Vermeulin only.

A. Protected Property Interest.

Defendants once again argue that plaintiff has not alleged a protected property interest in his position as

baseball coach.

In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Supreme Court explained: "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Perry v. Sindermann, 408 U.S. 593, 601 (1972), it was further amplified: "A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing."

As near as the court can tell from the allegations of the Complaint and plaintiff's statements at oral argument,

the basis for plaintiff's property interest is alleged to be a series of oral agreements, inferentially executed on an annual basis, the fact that he was annually renewed for a number of years, and that Don Champlin, the then principal, told plaintiff in 1974 that plaintiff ultimately would become the baseball coach (which, plaintiff did become, holding the position for six years). There are simply no other facts alleged from which plaintiff's claim of a protected property interest may be inferred. In the court's opinion, the allegation that defendant Jerome Kopp "would pull for him" is irrelevant to the issue.

The court points out that paragraph 13 of the Second Amended Complaint alleges in pertinent part:

> Plaintiff . . . was reappointed by Defendant . . . every year to the position of either Head Varsity Wrestling Coach or, for the past six

> (6) years, Head Varsity Baseball Coach at Thomas Downey High School. Pursuant to said practice, Plaintiff . . . entered into a written agreement with Defendant . . . on or about September, 1984, to continue being the head varsity baseball coach at Thomas Downey High School. Said written contract was similar to ones previously entered into from year to year between Plaintiff . . . and Defendant . . . since Plaintiff's first employment in September 1974. (The aforementioned written contracts were but formal confirmation of Plaintiff's yearly tasks and duties in both his coaching and teaching responsibilities -- as required by California law.)

At oral argument, however, plaintiff appeared to repudiate these allegations, stating, according to the court's recollection, that plaintiff had entered into a one-year written agreement with defendants the first year he was employed by defendants as a teach and coach at Thomas Downey High School, i.e., for the 1974-1975 school year. Plaintiff further stated that this written agreement was a confirmation of the alleged oral agreement

between himself and Don Champlin. Plaintiff further stated that the basis for his claim is the allegation that his various positions as coach were renewed for eleven years created a lifetime contract implied by law in the head varsity baseball coaching position subject to termination only for good cause.

There appears to be no question that plaintiff did not have tenure in the coaching position because it was supplemental to his regular teaching assignments. See California Education Code § 44923, which provides:

> In the event a permanent employee of a school district has tenure as a full-time employee of the district, any assignment or employment of such employee in addition to his full-time assignment may be terminated by the governing board of the district at any time.

This fact is recognized in paragraph 9 of the Second Amended Complaint wherein plaintiff alleges that he had a de facto

tenure right in his coaching employment responsibilities. It further appears from plaintiff's brief that he is relying heavily upon the de facto tenure concept in contending that he has alleged a constitutionally protected interest.

There is a decision from the Seventh Circuit involving issues virtually identical to those involved in this case, Smith v. Board of Education of Urbana School District No. 116, 708 F.2d 258 (7th Cir. 1983).[1] In Smith, the Seventh Circuit affirmed the granting of a motion to dismiss pursuant to Rule 12(b)(6), holding

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[1] Another decision from the Seventh Circuit, Vail v. Board of Education of Paris Union School District No. 95, 706 F.2d 1435 (7th Cir. 1983), is cited by plaintiff as supportive that he has alleged a constitutionally protected property interest. The court does not agree under the circumstances alleged herein, to the extent those circumstances can even be discerned. In Vail, the plaintiff had a two-year employment commitment, but was terminated at the end of the first year.

at 260-261, 263-265:

> Plaintiffs Warren Smith and John Gremer are physical education teachers in a public high school in Illinois. Each was also formerly the head coach of one of the school's athletic teams. Smith was head coach of the school's football team for 26 consecutive years; Gremer was head coach of the school's baseball team for 3 consecutive years. In the summer of 1979, the board of education for the state school district in which the high school is situated ('the school board') notified each that it would continue to employ him as a physical education teacher for the following school year but that it would not reemploy him as an athletic coach. In addition, several members of the school board made public their opinion that a change in coaches would be good for the school's athletic program. Plaintiffs kept their teaching jobs and demanded that they be reinstated to their former coaching positions. The school board refused and some two years later plaintiffs commenced this suit for reinstatement and damages in federal district court under 42 U.S.C. § 1983 against the school board, its members, and the superintendent of the surrounding school district.
>
> . . .
>
> The Fourteenth Amendment due process clause does not guarantee a football or baseball coach a job at a public high school even if his teams always win and his players idolize him. The

ultimate decision who is the best man to coach a state high school athletic team rests with state school officials, not with the federal courts. . . . At most, the Fourteenth Amendment due process clause guarantees a state athletic coach the right to know why he is being dismissed and to convince school officials before they dismiss him that they are making a mistake, that their reasons for dismissing him are either not supported by facts or less compelling than they think.

Not every state employee enjoys those rights. The Fourteenth Amendment prohibits the deprivation, without due process of law, of a person's 'life, liberty, or property'; not every state employee who is dismissed from employment is thereby deprived of his 'life, liberty, or property.' Liberty is freedom from too much government, not financial well-being. A state government that dismisses one of its employees does not, without more, deprive him of his liberty. . . . Nor does it deprive him of his 'property' unless the state earlier conferred upon him a right of continued employment by telling him, in a manner that made it reasonable for the employee to expect the state to stand behind its word, that it would continue to employ him. . . . Thus unless plaintiffs had some right under Illinois law to keep their coaching jobs -- unless the State, through its legislature or through the school board, told them, conditionally or unconditionally, that

it would retain them as coaches and unless it was reasonable for them to expect the school board to retain them as coaches -- plaintiffs had no right under the Fourteenth Amendment to any sort of hearing prior to their dismissal as coaches.

. . .

Plaintiffs allege in Counts XXI and XXI-II of the complaint another right of property in their coaching positions. They assert that when the school board first hired them as head coaches, it agreed to retain them as head coaches every school year thereafter until 'just cause existed' for the school board to replace them, thus giving them de facto tenure. A panel of this Circuit recently held that a person under contract to coach football at a state high school has a constitutionally protected property interest in his job. Vail v. Board of Education, 706 F.2d 1435 (7th Cir. 1983). But the contracts before us show that Smith and Gremer were not under coaching contracts when the school board replaced them and therefore had no de facto tenure.

Attached as exhibits to plaintiffs' complaint are copies of their written employment contracts with the school board. Those contracts did not guarantee them employment as coaches for an indefinite period of time. The first year the school board hired plaintiffs, plaintiffs each signed a written contract of employment. Smith's contract, in which the school

board agreed to pay him one salary for teaching and an additional salary for coaching football, expressly provides that Smith is to be employed 'for the fiscal year 1953-54 * * * in accordance with the provisions of the Illinois Tenure Law, Article 24 of [the] School Code of Illinois.' As discussed above, those statutory provisions do not confer tenure in non-teaching positions upon school employees. Gremer's contract, in which the school board also agreed to pay him one salary for teaching and an additional salary for serving as an assistant coach, expressly provides that '[i]t is understood that the terms of employment as stated in this letter are for the school year 1960-1961 only.' Every school year since plaintiffs were first hired, the school board has renewed their contracts of employment either by executing a new one-year contract of employment or by sending them written memoranda listing their salaries and non-teaching positions for the next school year. Thus it cannot be said that their written contracts gave plaintiffs tenure as coaches.

It is possible to read plaintiffs' amended complaint as alleging an oral contract by the school board to employ them indefinitely as coaches, but Illinois courts are distrustful of a claim by an employee that his employer orally contracted to pay him wages for an indefinite period of time. Illinois courts will enforce an oral promise to employ a person for life or some other equally indefinite length

of time only if the employee makes in return some sacrifice -- i.e., relinquishes another job and spends a considerable amount to relocate himself and his family -- that he probably would not have made absent a guarantee of continued permanent employment. . . . Plaintiffs do not allege that they made any such sacrifice in reliance upon the school board's alleged promise to employ them indefinitely. Plaintiffs allege only that in exchange for the school board's promise to reemploy them every school year they promised to coach. Under Illinois law an oral promise of permanent employment given in exchange for a promise to work is unenforceable. . . . Perhaps plaintiffs forewent other coaching positions at other schools by remaining so long at one school, but that is not sufficient to entitle them to relief against the school board. . . . Every person who accepts an offer of employment forgoes the possibility of working elsewhere.

The school board might also have acted in some way from which it could be inferred that it agreed to employ plaintiffs indefinitely as coaches, but to proceed in federal court upon a suit based upon such an agreement, plaintiffs must allege facts from which the agreement can be inferred. . . . The amended complaint contains no such allegations. Employment for a number of years in the same job position does not give one a contractual right to continued employment in that same position

absent a special statute. . . .

The final allegation plaintiffs make in support of their claimed property right in their coaching positions is that they had a 'reasonable expectation of reemployment' and therefore de facto tenure when the school board replaced them as coaches. . . . The Supreme Court has also rejected the argument that a state teacher with a one-year employment contract has a property right in being rehired just because the state has in the past rehired him and most other teachers it employes [sic] on a year-to-year basis. . . . Only if the state's past hiring practices constitute a common law of reemployment does the state have any duty to rehire one of its employees just because it has rehired him before. . . . There is nothing in the amended complaint to suggest the existence in plaintiffs' school district of a common law governing the reemployment of athletic coaches. There is nothing to suggest that the school board follows any set of standards when it considers whether to rehire an athletic coach and that it considers itself bound to apply that same set of standards every time an athletic coach's contract is up for renewal. . . . The most one can infer from plaintiffs' complaint is that in the past, the school board had been satisfied with plaintiffs' performances as coaches. That the school board had been satisfied in the past was, of course, no guarantee that it would always remain so.

Plaintiff argues that this action is distinguishable from Smith because in Smith the Seventh Circuit "found it significant that the coaches had not alleged that they had made any sacrifice in addition to their continued employment, in reliance upon the school board's alleged promise to employ them indefinitely." In the court's opinion, neither has plaintiff. He points to the allegation in paragraph 9 that he left his teaching job with the Marysville School District in 1974. It is clear from paragraph 9 that no one promised to employ plaintiff indefinitely as the head varsity baseball coach in 1974. In fact, at the time plaintiff left Marysville, Don Champlin only "assured" plaintiff that he would eventually be placed as a baseball coach, it not even being alleged that Champlin "assured" plaintiff that he would eventually be placed as a baseball coach,

it not even being alleged that Champlin "assured" plaintiff he would be placed as the head varsity baseball coach. While plaintiff conclusorily alleges in paragraph 9 that his indefinitely continued coaching position was the "intention of the parties," he alleges no facts from which such a mutual intention can be inferred. Plaintiff simply has not alleged facts from which it can be inferred that he left Marysville in detrimental reliance upon a promise of lifetime employment as a coach. Rather, he has alleged that he left Marysville in reliance upon a promise which was kept.

Plaintiff argues that Smith is distinguishable on another ground:

> [T]he [Seventh Circuit] relied upon the express language of the one year contract which, on its face, referred to the provisions of the Illinois tenure law which contained the statutory provisions which did not confer tenure in non-teaching positions. In the case at bar, no

> attempt has been made by Defendants to attach, on their behalf, the written agreement(s) which would make the case at bar more factually similar to Smith. Plaintiff's allegations on this score is that he was given promises made, that no one told him that it was a one-year contract terminable at the will of Defendants, and that this practice continued for eleven years. Neither the Court nor the Defendants can draw any inference from the allegations in the complaint which do not include any reference to the express language of the written contract(s) between the parties.

However, in the Court's Order filed September 5, 1986, granting defendants' motion to dismiss the First Amended Complaint with leave to amend, the court ruled in pertinent part:

> Lagos' pleadings are so evasive and vague that the court cannot determine what, if any, contract existed demonstrating a mutual understanding of indefinite employment. If there was a written contract, it is unclear what its terms and provisions were. Furthermore, it is unclear whether Lagos' coaching position was provided for in the written contract and, if so, what the employment terms were. The court must, therefore, dismiss this cause of action with leave to amend. Furthermore, the court will require lagos to plead the particular

> facts of any pertinent employment contracts. This means that any further pleading must include dates and length of employment expressed in any contract. Additionally, counsel will specify whether the contract referred to is written, oral or implied, and whether the contract referred to teaching or coaching responsibilities. Counsel is warned, however, that failure to comply with the court's particularity requirements could result in dismissal with prejudice.

In the court's opinion, plaintiff has for all intents and purposes failed to comply with this order. As noted supra, the court is still in the dark as to the terms and import of any written agreement, if indeed a written agreement ever existed. Plaintiff's above-quoted attempt to distinguish Smith, therefore, is given no credence by the court. Moreover, any argument by plaintiff that he was unaware of the annual, non-tenured nature of his coaching positions is belied by the allegations in paragraphs 9 and 10 of the Second Amended Complaint.

Plaintiff's final argument distinguishing Smith is that California law does not contain the limitations of Illinois law with regard to requiring consideration independent of the services to be performed and that the substantive law of California more than amply provides plaintiff with the necessary prima facie contractual basis to assert a property right in his coaching position. In so arguing, plaintiff relies on three theories, all of which involve termination of "at will" employees.

Thus, plaintiffs cites Rabago-Alvarez v. Dart Industries, 55 C.A.3d 91, 96 (1976) for the proposition that "[i]t is settled that contracts of employment in California are terminable only for good cause if either of two conditions exist: 1) the contract was supported by consideration independent of the services to be performed

by the employee for his prospective employer; or 2) the parties agreed, expressly or impliedly, that the employer could be terminated only for good cause." Plaintiff argues:

> Applying the test ennuciated [sic] in Rabago to the facts in the case at bar, the allegations of the Plaintiff are that he gave up existing employment and moved his home to defendants' school district; that he continued to be re-employed in his position in accordance with the promise made to him and its corresponding implications of continued employment in his coaching position so long as his work was satisfactory. Applying the second alternate condition, the Plaintiff herein has alleged the existence of an implied promise to terminate him only for good cause. The basis, as alleged throughout the Complaint, are the many facts including the promise made to him by Defendants' employee that Plaintiff would be placed in his strength position, the placement of Plaintiff in his strength position (baseball coaching), renewal of his many coaching positions, satisfactory performance in all of said coaching positions, that the renewal of Plaintiff's coaching positions were consistent with the practice and custom of Defendants with respect to its coaches in general, i.e., so long as job performance was satisfactory,

> coaching positions were retained by its coaches; reliance upon all of the foregoing by the Plaintiff in making efforts to improve is worth as a baseball coach to Defendants by taking a personal one year leave of absence and the like. Accordingly, Plaintiff has alleged much more than a unilateral expectation of continued employment.

The court does not agree. In Rabago-Alvarez, the plaintiff had previously worked for sixteen years as a direct seller of copper gift ware. Defendant's regional manager had repeatedly asked her to come to work for Dart Industries but she declined these offers until the regional manager informed her that he was offering her a permanent position which would last as long as her work efforts were satisfactory. He also told her that she would never be terminated arbitrarily, but only for good cause. Plaintiff was dismissed approximately one year after she was hired. The court held that plaintiff had fulfilled both conditions for establishing an

employment contract terminable only for good cause because she had given up her long-term employment while insisting upon a contract of permanent employment and she had agreed to do so only because the defendant's representatives had promised her permanent employment.

The allegations of the Second Amended Complaint do not resemble the fact of Rabago-Alvarez. Moreover, Rabago-Alvarez must be compared to cases such as Hillsman v. Sutter Community Hospitals, 153 C.A.3d 743 (1984), Shapiro v. Wells Fargo Realty Advisors, 152 C.A.3d 467 (1984), and Newfield v. Insurance Company of the West, 156 C.A.3d 440 (1984). These cases persuade the court that the mere fact than an employee left attractive prior employment or took steps to improve his worth will not, in the absence of an express or implied agreement, convert an

at-will employment agreement into one providing for termination for just cause.

Moreover, the alleged statement by Champlin in 1974 constitutes a best oblique language which does not suffice to establish a permanent employment relationship. Drzewiecki v. H & R Block, Inc., 24 C.A.3d 695, 702-703 (1972); Newfield v. Insurance Company of the West, supra, at 445.

Plaintiff also cites Cleary v. American Airlines, Inc., 111 C.A.3d 443, 456 (1980) for the proposition that "the longevity of the employee's service, together with the expressed policy of the employer [of adjudicating disputes], operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause." Plaintiff argues that he has plead facts bringing him within Cleary's ambit:

> [T]he Plaintiff has alleged 11 years of service together with the alleged policy of Defendants to treat its coaches consistent with the usual reasonable expectations associated with good work, i.e., no discharge absent good cause, with the further promise made to the Plaintiff before he accepted Defendants' employment. The 'form of estoppel', mentioned in Cleary, is clearly and more vigorously alleged in the case at bar.

The court is not persuaded that plaintiff has stated a claim which would be cognizable under Cleary had plaintiff sued for breach of contract. Plaintiff has alleged no established procedures for adjudicating disputes involving coaches. Baker v. Kaiser Aluminum and Chemical Corp., 608 F. Supp. 1315, 1322-1323 (N.D.Cal. 1984). Moreover, while plaintiff was a coach for 11 years, he was the head varsity baseball coach for only six years and it is termination from this position of which he complains.

Plaintiff also cites Pugh v. See's Candies, Inc., 116 C.A.3d 311 (1983) in

arguing that he "seeks to prove the existence of facts from which he reasonably relied and believed that he had an employment contract which was to continue indefinitely until one or the other of the parties wished, for some good reason, to sever their relationship. . . . As in Pugh, the Plaintiff is prepared to establish that he was commended in exemplary fashion, offered promotions, was never criticized for his work and performed tasks and duties admittedly beyond the expectation of Defendants."

There is a matter which may well preclude plaintiff's reliance of Pugh. "The Pugh analysis . . . applies only in the absence of an express agreement. A valid express agreement precludes a contradictory implied contract embracing the same subject matter." Baker v. Kaiser Aluminum and Chemical Corp., supra at 1320.

Moreover, the court cannot conclude that Pugh applies. There are no allegations that defendants ever told plaintiff that he would be terminated only for good cause. Plaintiff's coaching positions were subject to annual renewal, a fact of which plaintiff has alleged he was aware and of which he certainly was aware when Jerome Kopp told him he would pull for him. Finally, by reason of California Education Code § 44923, plaintiff knew that his coaching position could be terminated at any time.

Accordingly, the court concludes that plaintiff has not pleaded sufficient facts establishing that he had a constitutionally protected property interest in his position as the head varsity baseball coach at Thomas Downey High School. Consequently, the court grants this portion of defendants' motion to dismiss without leave

to amend.

B. Protected Liberty Interest.

In moving to dismiss plaintiff's claim that he has been deprived of a constitutionally protected liberty interest without due process of law, defendants cite a number of cases holding that no protected liberty interest is implicated where there is no public disclosure of the reasons for dismissal. This argument is directed to plaintiff's allegation in paragraph 12 that his liberty interest is implicated because his reputation as a competent baseball coach is endangered by the fact that he was not re-hired.

Plaintiff apparently concedes the correctness of defendants' argument:

> Defendants, in their attempt to deny the validity of Plaintiff's claimed denial of his liberty interest, misstate his claim in limiting their analysis to the failure to re-hire the Plaintiff. Plaintiff, in addition to alleging his termination, has alleged, in his original compliant, that Jerome

> Kopp, one of the co-conspirators, referred to the Plaintiff as 'ineffective.' Additionally, the Plaintiff has alleged that another co-conspirator and employee of Defendant, stated 'to third parties that the Plaintiff, John Lagos, had caused a shortage in the income accounts of the Thomas Downey High School Varsity Baseball Program.' . . . Defendants, in their points and authorities admit that when an allegation of dishonesty or immorality is made, a question of fact arises as to whether or not the person's good name, reputation, honor or integrity has been impugned. . . .

Any allegation that any defendant said plaintiff was "ineffective" is no longer part of this action because it has not been re-alleged in the Second Amended Complaint. In any event, in Smith v. Board of Education of Urbana School District No. 116, supra at 265-266, the Seventh Circuit further explained:

> Plaintiffs allege in Counts XXII and XXIV of their complaint that when the school board decided not to rehire them as coaches, several members of the school board made public statements about plaintiffs that deprived them of their liberty. These statements were that: a change in

coaches would be good for the school's athletic program, plaintiffs had over 50 years' combined coaching experience and it was time for a change, 'Good athletes do not go out for sports because they don't want to play for the present coaches,' and 'profanity, lack of respect, problems with discipline, fairness' were problems in the school's athletic program.

In Board of Regents v. Roth, . . . the Supreme Court acknowledge that '[t]here might be cases in which a State refused to reemploy a person under such circumstances that interests in liberty would be implicated.' If the State made public charges against a former employee 'that might seriously damage his standing and associations in his community' or that might 'impose[] on him a stigma or other disability that [would] foreclose[] his freedom to take advantage of other employment opportunities,' then the employee would be entitled to an opportunity to clear his name. Ours is not such a case.

It might be somewhat easier for plaintiffs to find new coaching positions at other schools if potential employers did not know that the school board no longer wants plaintiffs as coaches. But the Constitution did not require that the school board act secretly when it replaced plaintiffs so that they might have an easier time finding new employment. . . . It required only that members of the school board not

> make public statements so critical of plaintiffs' coaching abilities that it would be virtually impossible for them to find new employment in similar coaching positions or so critical of their persons that people in their community would no longer want to associate with them. The statements plaintiffs allege are not of these types. . . . Other school boards or private schools would hardly be less reluctant to hire plaintiffs as coaches after hearing these statements than they would be had they only heard that plaintiffs had been replaced. Since popularity in plaintiffs' community surely does not depend entirely upon one's successes on baseball diamonds and football fields, it is inconceivable that plaintiffs have become social outcasts because of these statements. One must dig beneath the statements to find actionable criticism of plaintiffs' coaching abilities, and no amount of digging will produce any criticism of plaintiffs' persons sufficient to meet the Roth standards.

Thus, even if it were alleged in the Second amended Complaint that Jerome Kopp had publicly stated that plaintiff was ineffective, plaintiff would not have state a claim upon which relief could be granted.

With regard to the other allegation referred to by plaintiff above, he is

referring tot he allegation that "[o]n or about July 1, 1985, Defendant RON VERMEULEN stated to third parties that the Plaintiff . . . had caused a shortage in the income accounts of the Thomas Downey High School varsity baseball program and that the Plaintiff had neglected the maintenance of the baseball field." These allegations also form the basis for plaintiff's pendent claim against Vermeulen for slander. The court views the allegation concerning the neglect of the filed in the same category as the "ineffective" allegation, and thus concludes that this statement does not suffice to state a claim upon which relief can be granted. The allegation regarding the shortage in the income account arguably impugn's plaintiff's honesty. However, as defendants assert: "[T]he comment by the individual defendant RON VERMEULEN was not attributed to the school district, was

after the fact [i.e. after the date on which plaintiff was terminated], [and] was not given as the reason for not rehiring him . . . ." The court agrees with defendants that these facts, implicit in the Second Amended Complaint, preclude plaintiff's reliance upon it as the basis for the statement of a claim against defendant.

Consequently, the court grants this portion of defendants' motion to dismiss.

C. Denial of Equal Protection.

In its Decision and Order Re Motion to Dismiss or For More Definite Statement filed May 19, 1986, the court held in pertinent part:

> Paragraph 18 also alleges that defendants have violated plaintiff's right to equal protection of the laws guaranteed under the Fourteenth Amendment. This complaint is brought pursuant to 42 U.S.C. § 1983. A claim for denial of equal protection pursuant to Section 1983 does not require an allegation of a suspect class or discrimination based on race,

national origin or sex. See, e.g., Guillory v. County of Orange, 731 F.2d 1379, 1383 (9th Cir. 1984); French v. Heyne, 547 F.2d 994, 997 (7th Cir. 1976). However, a claim for denial of equal protection must allege that plaintiff was treated differently from others similarly situated. Plaintiff's opposition to this portion of defendants' motion merely states:

> A detailed explanation is not, at this point, required. Defendants may challenge later, in the appropriate procedural manner, any of the questionable factual and/or legal underpinning of the Plaintiff's complaint. Clearly, by implication, Plaintiff has been treated differently than other teachers/coaches in the school and/or school district.

In the court's opinion, implication is not sufficient to state a claim for denial of equal protection. The court will require plaintiff to set forth concisely the facts upon which his equal protection claim is based. The complaint does not do so and the court cannot tell at this point whether the claim is based on the type of coaching contract he was given and the way in which he was terminated. Plaintiff's assertion that this can be resolved at some subsequent proceeding is without merit since at this point it is questionable that he has even stated a claim.

In its Order filed September 5, 1986,

the court once again held:

> Lagos also alleges that his Fourteenth Amendment right to Equal Protection under law was violated by the defendants' refusal to rehire him as baseball coach. Lagos pleads that he was treated differently than other similarly situated coaches. This court, however, previously required Lagos to set forth concisely the facts upon which he based his equal protection claim. . . .
>
> Lagos merely states that he was treated differently than other similarly situated coaches. This alone, however, is insufficient to state an equal protection claim. The court believes that Lagos has failed to set forth concisely the facts upon which he based his equal protection claim. Accordingly, because Lagos has failed to plead this claim with the requisite particularity, the court grants defendants' motion to dismiss this cause of action with leave to amend.

Paragraph 17 of the Second Amended Complaint now alleges:

> Plaintiff . . . has been subjected . . . to the deprivation [of] Plaintiff's right to equal protection . . . by treating Plaintiff differently than other similarly-situated coaches--all of whom are guaranteed equal protection of the laws . . .
>
> It was the custom, practice and

> procedure of Defendant MODESTO CITY SCHOOLS DISTRICT, up to and including June 17, 1985, and continuing to the present, that so long as Defendant's coaches performed their tasks satisfactorily, they would continue to be employed in said coaching positions. Plaintiff was further denied equal protection of the law by not permitting Plaintiff to continue in his coaching position, even though he had satisfactorily performed his coaching responsibilities - while other similarly situated coaches continued to be employed.

While defendants' challenge to the allegation in paragraph 17 of the Second Amended Complaint is that the allegation is conclusory, an argument with which the court agrees, the court also questions whether plaintiff has stated a cognizable claim for denial of equal protection. In fact, plaintiff's opposition to this motion does not discuss defendants' equal protection argument or equal protection at all. Rather, his opposing brief at page 13 argues that the allegation of paragraph 17 is relevant to a determination whether

plaintiff had a de facto tenure interest under the rationale of Perry v. Sindermann. Consequently, the court concludes that plaintiff's claim for denial of equal protection also is dismissed for failure to state a claim.

D. Dismissal Without Leave to Amend.

Defendants request that their motion be granted without leave to further amend the complaint. The court grants this request, plaintiff having had three opportunities to state claims upon which relief can be granted.

E. Pendent Claim.

Because of the court's rulings herein, the court hereby exercises its discretion and dismisses the pendent claim for slander alleged against defendant Ron Vermeulen.

IT IS ORDERED that defendants' Motion to Dismiss Second Amended Complaint without leave to amend is granted. IT IS FURTHER

ORDERED that the pendent claim for slander against defendant Ron Vermeulen is dismissed. IT IS FURTHER ORDERED that this action is dismissed.

JUDGMENT IS TO BE ENTERED IN ACCORDANCE HEREWITH.

DATED: April 16, 1987.

ROBERT E. COYLE
United States District Judge

§ 44923. Termination of extra assignment of full-time permanent employee.

In the event a permanent employee of a school district has tenure as a full-time employee of the district, any assignment or employment of such employee in addition to his full-time assignment may be terminated by the governing board of the district at any time.

Enacted Stats 1976 ch 1010 § 2, operative April 30, 1977.

Collateral References:

Annotations:

Right to dismiss public school teacher on ground that services are no longer needed. 100 ALR2d 1141.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R. S. § 1979; Dec. 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Explanatory notes:

This section was based upon Act Apr. 20, 1871, ch 22, § 1, 17 Stat. 13.

This section formerly appeared as 8 U.S.C. § 43.

Amendments:

1979. Act Dec. 29, 1979 inserted "or the District of Columbia" and "For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

Other provisions:

Application of 1979 amendments. Act Dec. 29, 1979, P. L. 96-170, § 3, 93 Stat. 1284, which appears as 28 USCS § 1343 note, provided that the amendments made to this section by such Act are applicable with

respect to any deprivation of rights, privileges, or immunities secured by the Constitution and laws occurring after enactment on Dec. 29, 1979.

CROSS REFERENCES

Privileges and immunities, USCS, Constitution, Art. 4, § 2 and Amend. 14, § 1.
Citizenship, USCS Constitution, Amend. 14, § 1.
Offenses against civil rights of citizens, 18 USCS §§ 241-246.
Jurisdiction of district courts, 28 USCS § 1343.
This section is referred to in 42 USCS §§ 1988, 1997E.

RESEARCH GUIDE

Federal Procedure L Ed:

Civil Rights, Fed Proc, L Ed, §§ 11:6, 8, 11, 16, 18, 21, 26, 45, 50, 59, 60, 63, 75, 84, 85, 88, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Sec. 2. Representatives - Power to reduce apportionment.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Sec. 3. Disqualification to hold office.

No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LAGOS No. 87-2114

Plaintiff/Appellant,

V.

MODESTO CITY SCHOOLS DISTRICT, et al.,

Defendants/Appellees.

_____/

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ATTORNEY'S FEES BY APPELLEES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 38 AND 28 U.S.C. SECTION 1927

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HONORABLE ROBERT E. COYLE, JUDGE

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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LAGOS,	)	
	)	
Plaintiff/Appellant,	)	No. 87-2114
	)	
vs.	)	POINTS AND
	)	AUTHORITIES IN
MODESTO CITY SCHOOLS	)	OPPOSITION TO
DISTRICT; et al.,	)	MOTION FOR
	)	ATTORNEY'S FEES
	)	BY APPELLEES
	)	PURSUANT TO
Defendants.	)	FEDERAL RULE OF
	)	APPELLATE
	)	PROCEDURE
	)	38 AND 28 U.S.C
		SECTION 1927

I

ARGUMENT

Appellees' Motion for Attorney's Fees is apparently alternately premised on 1)

the assumption that Plaintiff and Appellant has sought to intimidate and coerce Appellees by claiming over $11,500,000 in damages[1], of 2) that Appellant and Appellant's counsel had no factual or legal basis for bringing the lawsuit and/or for continuing it through various amended complaints and through this appeal. Accordingly, as Appellees' argument goes, Appellants lawsuit and/or appeal is necessarily frivolous, lacking good faith, meritless, etc.

Firstly, with respect to Appellees argument premised on the prayer sought by Appellant in his original complaint, Appellant herewith attaches, as Exhibits A-F, true and correct copies of other similar/identical cases involving teachers

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[1] Appellant assumes that this is a typographical error. In fact, the damages expressly sought for in the compliant were $1.5 million dollars.

who were summarily terminated or demoted and for whom damages were awarded in no less than six figures. As the attached Exhibits establish, the verdicts ranged from a high of $2.5 million in two different cases with the lowest being $275,000.

More importantly, even absent the above mentioned precedent, Appellees logic fails to pass muster. The prayer of a compliant which, in this case, asked for $1.5 million in compensatory damages for the loss of Appellant's employment, reputation and the attendant pain and suffering -- without any evidentiary basis to hold otherwise, cannot and should not be presumed unreasonable, frivolous or an act of bad faith. Wrongful discharge suits, in general, are known for the substantial damages that are recovered when liability is established. Furthermore, Appellees

reasoning is further flawed since they are asking for the payment of their attorney's fees on appeal from that portion of Appellant's appeal from the denial of sanctions pursuant to Rule 11 -- by virtue of the filing of unnecessary and meritless motions to dismiss. It is not the test of the award of sanctions to, in hindsight, determine that a motion or an appeal is meritless or frivolous because the Court's decision was unfavorable to the party now being sought to be sanctioned.

Appellees contention that Appellant had no factual or legal basis for bringing the present suit and/or for continuing the litigation through the Appellate process is ludicrous. In Appellant's opinion, the following decision of the Seventh Circuit are directly in point and dispositive in favor of Appellant: Vail v. Board of Education of Parish Union School District

No. 95 (1983) 706 F.2d 1435; Smith v. Board of Education of Urbana School District No. 116 of Champaign 983) 708 F.2d 258. It is still Appellant's good faith belief that, notwithstanding this Court's adverse opinion, Appellant's action is substantially more than a manufactured federal claim. Indeed, it is Appellant's intentions to file a Petition for Certiorari with the Supreme Court.

Appellee's attempt to create, again, in hindsight, the impression that Appellant was on notice that his lawsuit was frivolous, etc., given the specific statutory provisions of California Education Code Section 44923 which was relied upon by this Court in it's opinion. Again, this facile reasoning consists of the argument that because Appellant's position has not been vindicated, it must have been frivolous. In truth and in fact

such conclusions are not permitted by either Rule 38 of the Rules of Appellate Procedure or by the authority found in 28 U.S.C. 1927. In addition, the following cases -- all non-Ninth Circuit cases-- clearly stand for the proposition that the existence of a state statute which appears to invalidate the employment contract does not accomplish that purpose: Guiterez v. City of Chicago (1985) 605 F.Supp. 973; Smith v. Board of Education of Urbana School District No. 116 of Champaign (1983) 708 F.2d 258; Soni v. Board of Trustees of the University of Tennessee (1975) cert. denied, 513 F.2d 347, 426 U.S. 919, 96 S.Ct. 2623, 49 L.Ed. 372; Vail v. board of Education of Parish Union School District No. 95 (1983) 706 F.2d 1435. In fact, the only Ninth Circuit decision close to the issue involving the "illegality of contract" argument by virtue of the

existence of a state statute notes that precise issue was not decided in this Circuit. See San Bernardino Physician's Services Medical Group, Inc. v. County of San Bernardino, Board of Supervisors for San Bernardino (August 26, 1987) 87 C.D.O.S. 3204 at page 3205.

Appellees have provided this Court with no evidence of "general obstinacy (sic) unconnected with the merits of the case" and exclusively rely on conclusory and unsupported contentions of "revenge" and "coercement".

Appellees have not provided this Court with the kind of legal or factual support for it to conclude that Appellant lacked a plausible legal or factual basis for his appeal from the denial of his request for sanctions pursuant to Federal Rule 11. The facts of this case are almost identical with not only the Smith decision already

noted (which in the opinion of Appellant is totally in point and in favor with Appellant's position) but also is directly supported by the seminal decision of Perry v. Sindermann (1971) 408 U.S. 593, 9 S.Ct. 2694, 33 L.Ed.2d 570. Appellees were more than amply put on notice of the nature of Appellant's claim, i.e. the denial of his constitutionally protected property interest in his continued employment in his coaching position. See Knorr Brake Corp. v. Harbil, Inc. (1984, CA 7 IL) 738 F.2d 223 (before sanctions may be assessed under 28 U.S.C. Section 1927, attorney must lack plausible legal or factual basis); Freemen v. Local Union No. 135 Chauffeurs Teamsters, etc. (1984 CA 7 Ind.) 746 F.2d 1316 (Attorney's fees and costs not properly awardable pursuant to 28 U.S.C.S. Section 1927 and Rule 38 of Federal Rules of the Appellate Procedure where case

presented issue not previously decided in Circuit even though Appellant cited no cases in support of his contention and there was no indication of subjective bad faith on the part of Appellant's attorney.); Marco Holding Company v. Lear Siegler, Inc. (1985, ND IL) 606 F.Supp. 204 (In order for imposition of attorney's fees under 28 U.S.C.S.Section 1927 to be proper, actions by attorney must multiply proceedings, and such actions must be vexatious and unreasonable with claim lacking even colorable basis in law.)

As has been already discussed, Appellant has, in his view, a colorable claim which further relying on not only non-Ninth Circuit authority, but also Supreme Court decisions and decisions of this Circuit as more particularly set forth in Appellant's briefs.

It is further the opinion of the

undersigned that the publication of this decision by the Court is evidence of Appellant's position that his claim was colorable, reasonable and arguable. Furthermore, it is also the opinion of the undersigned that he has been publicly admonished, in effect, by motivations for filing this action, i.e. to intimidate and to coerce the Appellees. See International Harvester Credit Corp. v. John E. Henry, DBA Jim's Pump and Drilling Co. (86 Daily Journal D.A.R. 3795, page 3796- 1986).

For all of the foregoing reasons, Appellant respectfully requests that this Court deny Appellee's motions for attorney's fees.

DATED: June 28, 1988

LAW OFFICES OF PANOS LAGOS

/S/

BY: PANOS LAGOS, ESQ.

Oakland Lawyer Warns Agencies of Wrongful Termination Suits

From Staff Reports

Public agencies, once thought to be relatively immune to wrongful discharge lawsuits from former employees, have seen an onslaught of such cases in recent months, according to an Oakland attorney who represents management of both public agencies and private businesses.

Increasingly, public employees are making procedural headway in wrongful discharge suits against their employers.

And in a least a couple of instances, appellate court decisions have upheld the workers' right to tort remedies for wrongful discharge.

In the past, a public agency found by a court to have fired an employee wrongfully might have to reinstate the employee with three or four months' back pay, but now potential liability has increased tenfold, and litigation costs may also be greatly increased, said Joseph E. Wiley, a partner in the firm Corbett & Kane.

Recent cases may open the way for public employee suits charging breach of the implied covenant of good faith and fair dealing, intentional infliction of emotional distress, negligent infliction of emotional distress and defamation, Wiley said.

A "veritable explosion" of public sector wrongful discharge cases is now entering the courts, Wiley said, comparing the situation to the flood of suits by discharged private employees following the 1980 decision in *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167 (1980) that found a tort cause of action in the breach of good faith and fair dealing in private employment contracts.

This year in *Apte v. Regents of the University of California*, 198 Cal.App.3d 917 (1988), the court found breach of the covenant of good faith and fair dealing in the public context, said Suzanne Price, an attorney with Corbett & Kane.

California courts of appeal have sent three major messages in five decisions over the past 14 months, Wiley said. They are:

- Public employees who have held jobs for a number of years cannot be dismissed arbitrarily, even in the absence of civil service contracts, without the risk of a wrongful discharge lawsuit, and their claims are potentially just as costly as the six-figure awards for punitive damages in the private sector. Under state law, public agencies cannot be sued for punitive damages.
- Public agencies can be sued for "intentional infliction of emotional distress" in unfairly dismissing employees.
- Public agencies must follow all of their civil service and other personnel procedures carefully if they are to defend wrongful discharge lawsuits successfully.

"Public agencies have long thought they would avoid wrongful discharge claims because their employment practices are so highly regulated by civil service rules (or) union agreements," Wiley said. Instead, they often are vulnerable to lawsuits for overlooking a step in their personnel procedures, he said.

Public employers tend to have fairly detailed disciplinary policies, and sometimes poorly trained supervisors who do not comply with them, Wiley said.

Although Wiley predicted that public agencies face sizeable awards if found guilty of intentionally inflicting emotional distress, he noted that relatively little data is available yet. Four of the five cases reaching the appellate courts have only addressed the question of whether the former employee had the right to sue, and trials have not yet taken place.

The five cases are *City of Fresno v. Superior Court* 188 Cal.App.3d 1484 (1987); *Green v. City of Oceanside* 194 Cal.App.3d 212 (1987); *Valenzuela v. State of California* (1987) 194 Cal.App.3d 917; *Apte*; and *Knickerbocker v. City of Stockton*, 199 Cal.App.3d 235 (1988).

In a sixth case, decided this month, *Kemmerer v. County of Fresno*, 88 Daily Journal DAR 5871, the 4th District Court of Appeal ruled that civil servants do not have the right to go beyond civil service remedies.

In general, Northern California courts have been more likely to rule in favor of permitting public employees to sue than those in the south, according to Wiley.

In the one appellate case that went to trial, the jury awarded $125,000 to a janitor who was dismissed for poor performance after working for more than 10 years for the City of Oceanside. The major issue in the case, *Green v. City of Oceanside*, as with the others, was not the janitor's performance but whether the city had followed its own personnel polices, Wiley said.

In a separate case, *Mouchette v. Oakland Unified School District*, 612940-8, an Alameda County Superior court jury two months ago ordered the Oakland Unified School District to pay $500,000 to an employee who said he was dismissed for "political" reasons after 17 years of employment. The jury also found a school board member guilty of "oppression, fraud or malice" and ordered him to pay $25,000 in punitive damages.

It is important that public officials and board members understand they may be liable for punitive damages in such cases, Wiley said.

The full effect of the appellate court decisions to date is difficult to determine, Wiley said, as the California Supreme Court currently is reviewing seven cases that are expected to have a major impact on wrongful discharge litigation in the private sector.

Among the issues still to be addressed by the court are the question of whether verbal statements constitute an employment contract, the issues over which employees may sue, and the extent of the damages they can receive.

"During the last decade, there has been an ever-increasing erosion of the distinction between the rights of public sector employees compared with the rights of private sector employees," said Wiley, saying most public employees in California now have the right to strike and that the U.S. Supreme Court has ruled that state and local employers must follow federal requirements on overtime, minimum wage and related regulations.

BEST AV

Constitutional Damages

In the Michigan teacher's case, *Memphis Community School District v. Stachura*, 85-410, the justices ruled unanimously that a decision of the Sixth U.S. Circuit Court of Appeals should be reversed and remanded because compensatory damages cannot be based on the intrinsic values of constitutional rights.

"Damages based on the 'value' of constitutional rights are an unwieldy tool for ensuring compliance with the Constitution," Powell wrote in an opinion joined by Burger, Brennan, White, Rehnquist, Stevens and O'Connor. "History and tradition do not afford any sound guidance concerning the precise value that juries should place on constitutional protections."

"We therefore hold that damages based on abstract 'value' or 'importantce' of constitutional rights are not a permissible element of compensatory damages in such (civil rights) cases."

Marshall, in a concurring opinion joined by Brennan, Blackmun and Stevens, said he wrote separately to emphasize that "I do not understand the court, however, to hold that deprivations of constitutional rights can never themselves constitute compensable injuries." Marshall said that would defeat the purpose of federal civil rights laws.

The case stemmed from a controversy over the teaching of human reproduction by Edward Stachura in the public schools of Memphis, Mich., during the 1978-79 school year. Parents tried to pressure the school board to fire Stachura after hearing inaccurate rumors that he had shown explicit sex films to his students, but instead he was suspended without pay. He was reinstated the next fall, after filing a civil rights suit in federal court in Port Huron, Mich.

Stachura claimed violations of his due process rights and his First Amendment right to acadmic freedom. Judge James Harvey instructed the jury that one measure of damages was the value or importance of the constitutional rights which were violated. The jury awarded Stachura $275,000 in compensatory damages and $46,000 in punitive damages. The Sixth Circuit affirmed.

The justices ruled that since the effect of the improper jury instruction was unknown, the case must remanded for a new trial only on the issue of compensatory damages.

Brennan and Stevens wrote in a one-sentence statement that they joined both the majority and concurring opinions.

Patrick J. Berardo, a Lansing, Mich., attorney for the Memphis Community School District, said he "looked forward to further proceedings because there was no evidence that (Stachura) had any particular amount of actual damages."

Stachura's attorney, Jeffrey A. Heldt of Southfield, Mich., said "the decision suggests that the court is seeking to cut back on the availability of open-ended jury verdicts."

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Attorney awarded $300,000 in back fees

OAKLAND — A judge has awarded more than $300,000 in back fees and costs to Boyer August's attorney for the 10 years he spent representing the former San Ramon Valley school district dean in a civil rights case.

Alameda County Superior Judge Richard Bancroft said Concord attorney Michael McCabe is entitled to $18,535 in costs and $294,470 in fees for about 2,000 hours he and his colleagues put into the case.

The judge's ruling Friday brings the total judgment in the civil rights case against the school district to more than $600,000. The school district could have settled last year for $75,000.

August, who challenged his 1975 demotion from high school dean to English teacher, was awarded $316,000 by a jury in May 1985. He alleged he was demoted as a result of criticizing the district and the principal at the time, James Cozens.

He is currently an English teacher and counselor at California High School in San Ramon.

Fired Teacher Awarded $2.5 Million

LOS ANGELES (AP) -- A teacher who alleged she was fired because she is black was awarded $2.5 million and ordered reinstated to her state job by a federal jury.

"It's restored a lot of faith in being an American, and a black American woman at that," said Betty Andrews, 54, who formerly taught handicapped students at Camarillo State Hospital.

The state will decide next week whether to appeal, said Michael Mount, senior staff counsel for the state Department of Developmental Services, which was sued along with Andrews' supervisor.

A U.S. District Court jury ruled Thursday after a 20-day trial that the state must pay Andrews $750,000 in actual damages, $1.75 million in punitive damages and about $200,000 in legal fees.

Andrews, who now works at a private clinic here, argued that the dismissal from the state hospital 50 miles northwest of Los Angeles was unjustified and was motivated by racial prejudice.

Her attorney, Robert Baskin, said his client was fired in September 1982 for 15 alleged incidents of misconduct during the previous year.

Jury awards Kemp $2.5 million

By Michael Goodwin
The New York Times

ATLANTA — A federal jury ruled here yesterday that a University of Georgia instructor had been dismissed illegally in retaliation for opposing favored treatment for athletes. The jury awarded Jan Kemp more than $2.5 million for lost wages, mental anguish and punitive damages.

"It's a victory for academic integrity," said a smiling Kemp moments after the verdict. "I was interested in widespread therapeutic reform, and I think it can be brought about now."

She and her lawyer, Hue Henry, said they were pleasantly surprised by the amount of the award.

"It's like being in the wheel of fortune and winning the big prize," Kemp said.

Jan Kemp
Didn't expect so much money

Kemp, 36, has three degrees from Georgia, including a doctorate. After the verdict, she hugged her mother and announced she was throwing a party. She also said she would give 10 percent of the award to her church in Watkinsville, Ga.

"I tithe," she said, still smiling.

The defendants in the case were Virginia Y. Trotter, the university's vice president for academic affairs, and Leroy Ervin, the assistant vice president in charge of Georgia's developmental studies program, in which Kemp taught remedial English from 1978 until she was dismissed in 1983.

"I'm surprised at the verdict and

See KEMP, Page F-4

Kemp

Continued from Page F-1

disappointed," Trotter said. Ervin said, "The verdict surprised me."

They stood solemnly on either side of their lawyer, O. Hale Almand Jr., in the hallway outside the courtroom as Almand said a decision had not been made on whether to appeal. Almand is a private attorney who was hired by the university to represent Trotter and Ervin.

The award was divided as follows: $79,680.95 to compensate Kemp for lost wages; $200,000 for mental anguish and $1 for loss of reputation. Trotter, identified as the second-most powerful official at the university, was assessed $1.5 million in punitive damages, and Ervin was assessed $800,000 in punitive damages.

The verdict did not deal with Kemp's request for reinstatement, which she can now put to the presiding judge, Horace Ward. Also, the judge will rule on how much, if any, Georgia must pay in fees to Kemp's attorneys.

If the verdict and the award stand, the money to Kemp would be paid by the university and its insurers, according to a spokesman for the university regents.

H. Dean Propst, chancellor of the University of Georgia System, said the university's reputation "may well be tainted" by issues raised at the six-week trial. In a statement at a news conference, he ordered an audit of the developmental studies program, where non-credit remedial courses are offered, and said the questions raised about athletic favoritism "must be directly addressed without equivocation."

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THE ARIZONA REPUBLIC

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RIDAY OCTOBER 3, 1986 PHOENIX, ARIZONA 97TH YEAR, NO. 138

JA coach 'fired unfairly,' wins $695,000

/ GENE VARN
...thern Arizona Bureau

TUCSON — A Pima County ...perior Court jury decided Thurs... ...y that former basketball coach ...n Lindsey was fired unfairly by ... University of Arizona and ...arded him $695,000 for lost ...come.

After three hours of deliberation, ... jury of four men and four ...omen found that the UofA ...each a good-faith understand... ...g made when Lindsey was hired ... firing him in April 1983 after ...ly one year as coach.

Lindsey contended at the trial that he had been promised four years to develop a team and prove himself when he was hired by then Athletic Director Dave Strack.

In its verdict, the jury determined that Lindsey is owed $216,000 to cover his lost earnings for the three additional years he had been promised and $480,000 for a decrease in earning power beyond the four-year period.

At the time he was fired, Lindsey's base salary was $49,000, but his total earnings package, which included a $30,000 contract with an athletic shoe manufacturer, was $90,000.

Lindsey's lawyer, Michael LaVelle, told the jury during closing arguments Thursday that the four-year agreement would have been worth at least $289,000.

If Lindsey had served the average 12-year tenure of a Pacific 10 head basketball coach, he would have earned at least $997,000, LaVelle said.

Lindsey said after the verdict that he feels "vindicated" and "very, very pleased."

But, he added, "No amount of money could replace what I lost: my career and what I had worked 20 hard years for (the head-coach position in a major-college basketball program).

"Once your name is put on the list of coaches who are fired, it's extremely difficult to get back. I love coaching, and I will make every effort to get back, but winning the lawsuit won't by any means be a guarantee that I will."

Lindsey said he is "very disappointed" that during the trial UofA lawyers dwelled on an affair he had with a Phoenix woman during his year at the university.

"The UofA threw everything they could at us," he said. "They caused a lot of pain that really was uncalled for."

Testimony during the trial about the affair "revived old memories and old wounds," Lindsey said.

Lindsey also expressed bitterness over a $300,000 settlement that the state Board of Regents reached last year with Bob Weinhauer, who was fired in July 1985 after three years as basketball coach at Arizona State University.

"I was totally surprised they wouldn't fulfill their obligation to me," he said. "It would have saved much money and much time, agony and embarrassment."

— Coach, 19

Ben Lindsey
Says he feels vindicated

Senate kills veto of stiff sanctions

Coach

Continued from A1

Lindsey said that soon after he was fired, "I offered a settlement that was far less than what the jury awarded."

LaVelle, Lindsey's attorney, said the verdict "sends a message to the university that it must be fair to its employees."

[illegible] lawyers James Richmond and Reid Garrey left the courtroom quickly after the verdict and later could not be reached for comment. Several university officials and regents who were contacted after the verdict refused to comment until they had read its details.

LaVelle said he expects the UofA to appeal, "but I think they'll have a hard time getting it overturned."

Lindsey will not be paid any money until the verdict is affirmed by an appeals court, a process that could take "a long time," LaVelle said.

Two jurors said Lindsey's affair played no part in the decision.

"W- all felt, basically, that he was . .ted unfairly," juror Chuck Arriaga said.

Another juror, Gale Boak, said, "One year was just too short a time."

Boak and Arriaga said they accepted the testimony of three coaches called as witnesses for Lindsey that a coach cannot be judged in one year, but needs three to four years before he can be evaluated fairly.

"That's the way things go down in college basketball all the time," Arriaga said. "They (coaches) are going to be given three to four years."

Arriaga said the jury rejected the contention of the UofA lawyers that Lindsey was a bad coach.

"We went on his past record," Arriaga said of Lindsey's 317-137 won-lost record, which included two national small-college championships, compiled by his teams during 17 years at Grand Canyon College in Phoenix.

Arriaga said the jurors agreed soon after their deliberations began Thursday afternoon that Lindsey should be compensated for the remaining years for what they believed was the UofA's four-year obligation to Lindsey.

But, he said, "There was a big dispute on what he should be given for his career."

During closing arguments Thursday, jurors were asked to decide whether Lndsey had been "used, abused and thrown away" by the university or was an incompetent basketball coach who put a love affair above his team.

LaVelle, Lindsey's lawyer, said the coach "walked into a stacked deck" at the UofA, a situation in which the new athletic director, Cedric Dempsey, had succumbed to "seamy backroom dealing" engineered by powerful alumni to dump Lindsey in favor of a "big-name coach."

Despsey used a dismal 4-24 team record, the complaints of "headstrong players" and trumped-up charges of bad coaching to fire Lindsey and replace him with that big name, Lute Olson, then coach at the University of Iowa, LaVelle said.

When UofA officials realized that the reasons given for firing Lindsey — bad recruiting, bad relationship with players and bad coaching — would not stand up in a courtroom, LaVelle said, they delved into Lindsey's personal life to get jurors to "succumb to some baser instincts."

"Aha! Ben Lindsey had a girlfriend, so he was out of the office a lot and cheating the university," LaVelle said in depicting UofA lawyers' reasoning.

But the girlfriend, Brenda Parker, testified that she saw Lindsey only a few times during the season and never during working hours, LaVelle said.

UofA lawyer James Richmond told the jury that only weeks before the trial, school officials learned the specifics of the affair and its effect on the team.

When the UofA learned how much the affair had "disrupted the basketball program," Richmond said, "how could we leave it out of the case? How could we pretend it never happened?"

Lindsey's affair and his attempts to involve his staff in concealing it from his wife, Jerri, took precedence over basketball, the UofA lawyer said.

PROOF OF SERVICE

I am employed in the County of Alameda, State of California. I am over the age of 18 years and not a party to the within action; my business address is 5026 Woodminster Lane, Oakland, California 94602.

On June 28, 1988 I served the attached document entitled:

POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR ATTORNEY'S FEES BY APPELLEES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 38 AND 28 U.S.C. SECTION 1927

on the following parties in said action by placing

(xx) a true copy thereof
or
( ) the original

enclosed in a sealed envelope addressed as follows:

Carolee Weber Kilduff
BOLLING, WALTER & GAWTHROP
7919 Folsom Blvd., Suite 300
Sacramento, CA 95826

(xx) (BY MAIL) I caused such envelope, with postage thereon fully prepaid, to be placed in the United States mail at Oakland, California.

( ) (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

( ) (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

(xx) (FEDERAL) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 28, 1988, at Oakland, California.

NICK ARETAKIS

CAROLEE G. KILDUFF
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CGK:ra
Attorneys For: Defendants

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JOHN LAGOS, Plaintiff, vs. MODESTO CITY SCHOOLS DISTRICT; et al., Defendants.	No. CIV. F-86-106 REC AFFIDAVIT IN SUPPORT OF APPLICATION FOR ATTORNEY'S FEES

AFFIDAVIT

STATE OF CALIFORNIA)
: ss.
COUNTY OF SACRAMENTO)

I, Carolee G. Weber-Kilduff, being

first duly sworn, affirm and declare that:

I am an attorney duly licensed to practice law in the State of California and this Honorable Court and am a member of the law firm of Bolling, Walter & Gawthrop, attorneys for appellees MODESTO CITY SCHOOLS DISTRICT, JEROME KOPP, JOE GREGORI, BOB POKORNY, MICHAEL McKIBBAN, STEVEN GREENBEAUX, RON VERMEULEN, ALAN VINCENT and DAN WOOD.

Appellees are the prevailing parties in this appeal as shown by the attached order and amended opinion of this Court.

Appellees seek attorney's fees under the statutes cited in appellee's motion on the grounds that there was no reasonable basis for pursuing this appeal, and it was apparently done for further purposes of coercion, harassment and intimidation.

Appellees seek the amount of $5,525.00 as the appropriate amount for time spent.

I have personally reviewed the itemized records of time logged.

Compensation is for hours which I personally logged.

The issues presented by this appeal and appellant's lengthy opening brief required extensive additional research and briefing in response.

The time expended in defense of this appeal precluded me from working on other cases being handled by our office.

I have been practicing in Federal Court and on Federal Civil Rights matters since 1983, and have researched, briefed and argued numerous motions related to Section 1983 actions in that time period.

Our office generally charges $85.00 to $90.00 per hour for federal cases, appeals, and wrongful termination defense.

The fees itemized in the attached documentation were actual fees charged to

our clients.

Our firm has an excellent reputation in defending actions of this type.

I believe that this ia a frivolous appeal from a frivolous suit with no reasonable factual or legal basis.

Many of the cases cited in the points and authorities accompanying our motion have awarded fees in similar or much larger amounts under similar circumstances, and this Court is undoubtedly aware of additional cases in which substantial attorney's fees have been awarded to the prevailing party in Civil Rights actions.

I believe the fees requested are reasonable for the services incurred.

I have personally checked and computed the accuracy of those figures.

The rate of $85.00 per hour is the same, less, or very close to the amount charged by other firms in our area for this

type of work, based on information obtained from attorneys in other firms.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 day of June, 1988, at Sacramento, California.

CAROLEE G. WEBER-KILDUFF

Subscribed and sworn to before me on June 28, 1988.

R. HUGHES

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LAGOS, Plaintiff-Appellant, vs. MODESTO CITY SCHOOLS DISTRICT; et al., Defendants-Appellees.	)	No. 87-2114

MOTION FOR ATTORNEY'S FEES BY APPELLEES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 38 AND 28 U.S.C. §1927

ON APPEAL FROM THE UNITED DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA
HONORABLE ROBERT E. COYLE, JUDGE

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STEVEN GREENBEAUX, RON VERMEULEN,
ALAN VINCENT and DAN WOOD

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN LAGOS, Plaintiff/Appellant, v. MODESTO CITY SCHOOLS DISTRICT, et al. Defendants/Appellees. _____/	No. 87-2114 MOTION FOR ATTORNEY'S FEES BY APPELLEES PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 38 AND 28 U.S.C. §1927; MEMORANDUM OF POINTS AND AUTHORITIES; SUPPORTING DECLARATION

COME NOW Appellees and move this Court for an award of attorneys' fees pursuant to Federal Rule of Appellate Procedure 38 and

28 U.S.C. §1927. Appellees move the Court for attorneys' fees on the grounds that appellant's filing of the appeal, and in particular the section of the appeal related to the denial by the trial court of Rule 11 sanctions, was frivolous and without merit. Appellant was on notice of the lack of support on a factual and legal basis for his complaint pursuant to ruling on previous motions to dismiss by defendants and the opinion filed by the Honorable Robert E. Coyle in the District Court.

MEMORANDUM OF POINTS AND AUTHORITIES

I

INTRODUCTION AND STATEMENT OF FACTS

As outlined in the briefs of both appellant and appellees, this case was originally filed by appellant JOHN LAGOS on or about February 21, 1986. Thereafter, the appellees MODESTO CITY SCHOOLS

DISTRICT, JEROME KOPP, JOE GREGORI, BOB POKORNY, MICHAEL McKIBBAN, STEVEN GREENBEAUX, RON VERMEULEN, ALAN VINCENT and DAN WOOD filed a motion to dismiss which was granted with leave to amend. In opposing the original motion to dismiss by appellees, appellant and plaintiff JOHN LAGOS sought Rule 11 sanctions for unnecessary delay. The Court, however, found that defendants' and appellees' motion was well taken, and further found that subsequent arguments contained in subsequent motions to dismiss were also valid. Ultimately, the Honorable Robert E. Coyle dismissed plaintiff's and appellant's complaint without leave to amend by way of decision and order issued April 16, 1987, granting defendants' motion to dismiss the second amended complaint.

In spite of the numerous motions, briefs, and arguments by the parties, and

the District Court's lengthy ruling analyzing the law and pointing out to appellant that there was no basis for the complaint, appellant persisted in filing the present frivolous appeal. As noted in this Court's opinion, plaintiff and appellant during the court of this litigation has sought to intimidate and coerce defendants by claiming over $11,500,000 in damages because of a loss of a coaching position which paid a stipend of only about $1,000 per year. The appeal was obviously an additional way of attempting to pressure defendants and appellees.

A court may award costs and attorneys' fees under 28 U.S.C. §1927 against a party and his attorney when an amended complaint and appeal are mere attempts to manufacture federal claims where plaintiff knew or should have know that none existed. (See Wang v. Gordon (7th Cir. 1983) 715 F.2d

1187, 1190.) As the District of Columbia Circuit Court pointed out in awarding attorneys' fees to a defendant:

> "Frivolous suits such as the one brought here do not aid the cause of civil rights. On the contrary, they undermine the legitimate efforts of those bringing legitimate suits, and draw scarce judicial resources away from those cases." (Harris v. Group Health Ass'n, Inc. (D.C. Cir. 1981) 662 F.2d 869, 874.)"

Various cases have awarded attorneys' fees to defendants where a plaintiff had no objective evidence to support an alleged claim, as in this case. (Brisbane v. Port Authority of N.Y. & N.J. (1982) 550 F.Supp. 222, 2230-224; Obin v. Dist. No. 9, International Ass'n. of Machinists (Miss. 1980) 487 F.Supp. 368, 370; CVC & D Sportswear Corp. (Ga. 1975) 398 F.Supp. 300, 307.)

In the case of American Family Life Insurance of Columbus v. Teasdale (8th Cir. 1984) 733 F.2d 559, the appellate court

upheld an attorneys' fees award against a plaintiff and stated:

> ". . . [T]he entire public inevitably suffers when a vindictive plaintiff squanders limited judicial resources by prosecuting frivolous lawsuits." (Id. at 570.)

A court has the inherent power to assess attorneys' fees against counsel for bad faith conduct of litigation or a willful abuse of the judicial process. (Roadway Express, Inc. v. Piper (1980) 447 U.S. 752.) A finding of bad faith does not require that the action be totally frivolous. Even where there is assertion of a colorable claim assessment of attorneys' fees against a party and his counsel is appropriate "for general obstinacy unconnected with the merits of the case." (Lipsig v. National Student Marketing Corp. (D.C. Cir. 1980 per curiam) 663 F.2d 178, 182, citing Roadway Express, Inc. v. Piper, supra.) Similarly, in the

case of Lewis v. Brown & Root, Inc. (5th Cir. 1983) 711 F.2d 1287, 1291-92 the Fifth Circuit court found that plaintiff's counsel had wasted the time of opposing counsel and the court in pursuing the matter and awarded a joint assessment of attorneys' fees against plaintiff and plaintiff's counsel. In Durrett v. Jenkins Brickyard, Inc. (11 Cir. 1982) 678 F.2d 911, the court found that even a pro per plaintiff filing a frivolous action should be subject to some deterrent effect by way of assessment of attorneys' fees. The facts of the present appeal reflect a coach angry about the loss of his position, who with his attorney, has abused the judicial process in an effort to seek revenge and coerce the defendants and appellees to rehiring him.

II

CONCLUSION

In the present case, it is clear that plaintiff and his counsel had no factual or legal basis for bringing the present suit in the first place, or for continuing the litigation through the various amended complaints, and through this appeal. There is no case factually on point which supports plaintiff's position. Plaintiff, a long-time teacher, and his counsel were on notice that they could not claim a de facto tenure in the coaching position given the specific statutory provisions of California Education Code §44923, cited in appellees' motion to dismiss.

As indicated in the attached declaration, defendants' and appellees' attorneys have been forced to expend at least 65 hours in litigating this appeal, one-tenth of which (6.5 hours) is

applicable to the section of the appeal related to the Rule 11 sanctions requested by plaintiff in the District Court and denied by that Court. This particular section of the appeal is to an even greater degree completely frivolous, without merit and in bad faith. It is an obvious attempt to seek funding for this vexatious appeal. As indicated in the attached declaration, the portion of attorneys' fees applicable to this section totals $552.50 at the regularly hourly rate.

Defendants and appellees MODESTO CITY SCHOOLS DISTRICT, JEROME KOPP, JOE GREGORI, BOB POKORNY, MICHAEL McKIBBAN, STEVEN GREENBEAUX, RON VERMEULEN, ALAN VINCENT and DAN WOOD, request that this Court grant reasonable attorneys' fees as outlined in the attached declaration in the amount of $5,525.00 as those fees reasonably incurred in the defense of this action

through the appeal to the Ninth Circuit Court. The action was without merit when it was filed in the District Court, and after the extensive briefing by both parties and the detailed ruling by the Court, plaintiff and his attorney knew or should have known that this claim had no reasonable support in fact or in law and could not survive. There was no conceivable basis for the filing of the present appeal except as a further attempt by plaintiff and his counsel to coerce and intimidate defendants, and to force them to incur additional expense.

For all of the foregoing reasons, defendants and appellees request an award of attorneys' fees against plaintiff and

his counsel in the full amount of $5,525.00.

Respectfully submitted,

Dated: June 21, 1988

BOLLING, WALTER & GAWTHROP

By:_____
Carolee Weber Kilduff

DECLARATION OF CAROLEE WEBER KILDUFF

I, Carolee Weber Kilduff declare:

I am a member of the law firm of Bolling, Walter & Gawthrop, attorneys for defendants and appellees MODESTO CITY SCHOOLS DISTRICT, JEROME KOPP, JOE GREGORI, BOB POKORNY, MICHAEL McKIBBAN, STEVEN GREENBEAUX, RON VERMEULEN, ALAN VINCENT and DAN WOOD.

Following the dismissal by the District Court of plaintiff's complaint, I have personally handled the research, drafting and appearance required to defend the Ninth Circuit appeal by plaintiff and

his counsel.

I have reviewed the itemized hours logged.

I have spent more than 65 hours in reviewing, researching, preparing, filing and arguing this appeal in the Ninth Circuit Court.

At least one-tenth of those hours, or 6.5 hours, were spent in researching and drafting the section of the appeal related to a refusal of the District Court to award Rule 11 sanctions.

Our regular hourly rate for this appeal is $85.00 per hour.

Computing this, I reach a total of $5,525.00 for the total of 65 hours expended in defense of this appeal, with the sum of $552.50 in attorneys' fees expended for that portion of the appeal related to the Rule 11 sanctions.

I hereby declare under penalty of

perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 21st day of June, 1988, at Sacramento, California.

_____

Carolee Weber Kilduff

CERTIFICATE OF SERVICE

I, Panos Lagos, hereby certify:

I am a citizen of the United States and am employed in the city of Oakland, County of Alameda, California; I am over the age of eighteen years and not a party to the within action; my business address is 5032 Woodminister Lane, Oakland, California.

On August 31, 1988, I served the within

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND ACCOMPANYING APPENDIX

on the parties in said action, by placing a true and correct copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in a United States post office mail box at Oakland, California.

addressed as follow:

Carolee Weber-Kilduff
BOLLING, WALTER & GAWTHROP
7919 Folsom Boulevard, Suite 300
Sacramento, CA 95826

all parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 31st day of August, 1988, at Oakland, California.

/S/
PANOS LAGOS